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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM 1948

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Nos. 3585-3586

J. P. BEELER, *Appellant*

vs.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, doing business by and through Joseph B. Fleming and Aaron Colnon, as Trustees, *Appellee.*

PETITION FROM THE
UNITED STATES CIRCUIT COURT OF APPEALS
TENTH DISTRICT

PETITION FOR WRIT OF CERTIORARI
and
BRIEF OF APPELLANT

CLAUDE E. SOWERS,
Of Wichita, Kansas,
Attorney for Petitioner.

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PETITION FOR WRIT OF CERTIORARI

Comes now the petitioner, J. P. Beeler, and respectfully requests a review and that a writ of certiorari be

granted in a decree in the United States Court of Appeals, Tenth Circuit, in each of the above-entitled causes of action.

These causes concern prompt and orderly settlement of all disputes concerning rates of pay, rules, working conditions and disputes growing out of grievances and interpretation and application of grievances concerning rates of pay, rules, wrongful discharge and working conditions in collective bargaining agreements between individual employees and employers, under the Railway Labor Act of May 20, 1926, Title 45 USCA, Chap. 8, as further amended in 1934. Under Sec. 237b and 240a, Jud. Code, as amended February 13, 1934, May 22, 1938, Chap. 229, 43 Stat. 936, the Supreme Court of the United States shall be competent, upon petition of any party thereto, in any case, civil or criminal, in a Circuit Court of Appeals, whether government or other litigant, to require by certiorari, before or after judgment or decree by such lower court. That the causes be certified to the Supreme Court for determination. That Sec. 2, amended by Sec. 13 (b) of Act of May 20, 1926, Chap. 347, 44 Stat. 587, gives jurisdiction to the Supreme Court as to Railway Labor Act and is included among the cases of Sec. 239 and 240 of the Judicial Code, shall apply, Appendix to Supreme Court rules, Page 5 of the Revised Rules adopted February 13, 1939, amended March 25, 1940, October 21, 1940, May 26, 1941.

> "The Supreme Court has jurisdiction of all matters concerning Railway Labor Act as amended 1934, certified from the Circuit Court of Appeals for review and final determination." *Elgin, Joliet & Eastern R. R. Co. v. Burley,* 325 U. S. 711 and 761, 89 L. ed. 1886.

That on July 21, 1948, an opinion was rendered by the United States Court of Appeals, Tenth Circuit, affirming judgment in Cases No. 3585 and 3586, R. 122. That petition for rehearing was duly filed August 10, 1948, R. 123. That rehearing was by the Circuit Court of Appeals denied, August 17, 1948. That on August 30, 1948 mandates were by the United States Circuit Court of Appeals issued in accordance with the opinions and judgments, R. 127, and record duly certified by the Clerk of said Court on September 24, 1948, R. 127, and the same is now before the Supreme Court for review.

Petitioner, Beeler, brings these two actions, one for reinstatement of petitioner's job as Yardmaster with Rock Island railway at Wichita, Kansas, with full restitution of salary and seniority rating at Wichita as damages for wrongful discharge from that position or in lieu thereof damages based on his salary as Yardmaster for his life expectancy. The other action, he seeks judgment for alleged overtime compensation for hours worked in excess of eight hours per day as provided for in an agreement of May 20, 1944, from June 1, 1944 to June 17, 1946 and expense for his automobile. The cases were consolidated for trial, all based on collective bargaining agreements, contracts and the general purposes, intents and requirements under the Railway Labor Act pertaining thereto.

The summary of the matters involved embody the important issues of the findings of fact and conclusions of law of the District Court, as well as the statement of points upon which appellant relied upon appeal. They are substantially as follows:

1a. Are the January 1, 1938, February 3, 1939 and May 20, 1944 collective bargaining agreements inconsistent with or contrary to the aims, purposes and requirements of the Railway Labor Act?

1b. If the Rock Island required the petitioner, Beeler, to perform the duties of Yardmaster from January 1, 1938 to June 17, 1946, same consuming ninety per cent of his time as Agent-Yardmaster and the duties of supervising the Freight Agent's office which consumed ten per cent of his time, would not Beeler be classified as an employee under ExParte 72 of Interstate Commerce Commission Acts, 3374 Vo. 4, under heading of 'Routine Duties', to be consistent and meet the requirements of the intents and purposes of the Railway Labor Act?

1c. Would the defendant railroad be permitted to abolish Yardmaster job under collective bargaining agreement of February 3, 1939, without abolishing the duties of the said job, and require Beeler to continue to perform all of the duties of the same, as if it were not abolished, up to and including June 17, 1946, under the collective bargaining agreements of January 1, 1938, February 3, 1939 and May 20, 1944, and further deprive Beeler of his classification of Yardmaster under the said bargaining agreements, without being in direct conflict with the purposes, as well as the intents and requirements of the Railway Labor Act?

2. Can bargaining representative of the Yardmasters of America confer with Rock Island, employer, and negotiate and abolish a Yardmaster job of an individual employee under collective bargaining agreement of February 3, 1939, depriving said individual employee of his classification of Yardmaster under the said agreement, without petitioner's knowledge or notice to said

individual employee, thereby depriving him of protection to exercise his rights under the Railway Labor Act as to privileges under his seniority, without being in conflict with Article 13, Plaintiff's Exhibit 3, R28, 84, requiring thirty days written notice, and Para. 156, Title 45 USCA, Railway Labor Act, and further conflicts with petitioner's rights of due process under Fifth Amendment to Constitution of the United States?

3. Can Rock Island, as employer, confer with union bargaining representative on matters outside scope of authorization and without knowledge or consent of individual employee (Beeler), make material alterations in employee's status, bind said individual employee without the said employee being a party to said negotiations and without ratification of said changes by said employee?

4. If Beeler was considered Yardmaster, under the classification of employee as interpreted and designated under ExParte 72, ICC ruling of Railway Labor Act, by reason of performing the routine duties of said job, would Beeler not be subject to May 20, 1944 agreement and thereby be entitled to overtime pay under the eight hour day set forth in said agreement, effective June 1, 1944, to date of Beeler's discharge, June 17, 1946, as computed in Plaintiff's Exhibit 11, R. 54, 91?

5. If Beeler was an employee of Rock Island, subject to said bargaining agreements and the Railway Labor Act on June 17, 1946, by reason of performing all of the routine duties of Yardmaster at Wichita continuously for 29 years prior to date of his said discharge, designated by ICC rulings, ExParte 72 'Routine Duties', would not his discharge of employment without notice as set forth in collective bargaining agreement of May 20, 1944, Plaintiff's Exhibit 2, Article 12, R. 79,

by his employer, be a breach of said collective bargaining agreement and entitle Beeler to be reinstated and compensated for any loss, if any, less compensation in other employment, and damages for all time lost after June 17, 1946 as set forth in said Article 12 of agreement?

This petitioner believes that the above two cases should be reviewed by the Court for the following reasons:

1. That the Circuit Court of Appeals decided an important question of federal law, which has not been, but should be settled by this Court.

2. That the Circuit Court of Appeals decided a federal question in a way probably in conflict with applicable decisions of this court.

3. That the Circuit Court of Appeals has so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

4. That the question of depriving employee of seniority rights is in substance depriving him of his personal property rights of due process and contrary to the Fifth Amendment of the Constitution of the United States.

WHEREFORE AND BY REASON OF THE FOREGOING, this petitioner prays that these actions will be certified from the Circuit Court of Appeals for review and final determination to the Supreme Court, and for such other and further relief as the Court may deem just, equitable and proper.

CLAUDE E. SOWERS
Attorney for Petitioner.

BRIEF

TESTIMONY OF BEELER, PETITIONER

Beeler, petitioner herein, worked for Rock Island railroad from *March 13, 1903 to June 17, 1946.* The employment was continuous. Beeler was appointed Yardmaster at Caldwell by Rock Island on December 31, 1907, transferred to Wichita, Kansas as Yardmaster, June 17, 1917, R. 24, from which date he performed all of the duties as Yardmaster at Wichita, Kansas, until June 17, 1946, supervising the yard and operating force. That on or about December 24, 1937, Brown and Franklin of Rock Island ordered Beeler to take over the extra duties of Freight Agent Lusk, who was retiring January 1, 1938, R. 25. Rock Island required Beeler to perform all of his duties as Yardmaster as he had in the past, Rock Island to pay Beeler *$20.00 per month* extra in addition to his regular Yardmaster salary, for performing Agent's duties, Beeler's chief duties to be Yardmaster, R. 26, 32. That Beeler used his automobile on company business and insured said automobile to protect company, R. 33. On January 1, 1938, a collective bargaining agreement was executed between Rock Island and the representatives of Yardmasters of America union, Plaintiff's Exhibit 3, R. 28, 81. On January 1, 1938, Rock Island, *in writing, assigned Beeler* in its regular bulletin from the operating office in Chicago, to the Yardmaster job at Cline Yard, Wichita, Kansas at a salary of $290.00 per month, R. 28, 87. At that time Beeler asked for Assistant Yardmaster to help him, R. 34. Beeler assumed and performed extra duties of Freight Agent as ordered but was required to perform all of

the duties of Yardmaster and if he failed to do so, under May 20, 1944 agreement, he forfeited all of his seniority rights as Yardmaster, Plaintiff's Exhibit 2, Article 7e, R. 27, 76. On January 7, 1939, Rock Island's Superintendent at El Reno, notified Beeler by bulletin his seniority at Wichita was transferred to Caldwell, Kansas, R. 29, Plaintiff's Exhibit 6, R. 30, 89. Beeler immediately made personal grievance to officials of Rock Island to no avail. He wrote letter to Mielke, President and General Chairman of Yardmasters of America, at Chicago, Defendants' Exhibit A, R. 37, 92, requesting he take the matter up with the authorities of Rock Island and have his seniority transferred back to Wichita in compliance with Plaintiff's Exhibit 3, R. 28, Article 3, R. 82. Beeler stated at this time in said letter that Agent's duties were assigned him in addition to Yardmaster duties, (Defendants' Exhibit A, R. 37, 92). Mielke secured a conference with F. H. Frey and negotiations were made and entered into on February 3, 1939. Rock Island sent a letter to Mielke, who accepted the same, said letter setting forth the transfer of Beeler's seniority back to Wichita, Kansas as requested, R. 28, 29, and in addition thereto, stated in said letter that Beeler was to be considered official of the company, not subject to agreement, Defendants' Exhibit B, R. 43, 94. After negotiations, regarding February 3, 1939, letter, Rock Island, through Superintendent Henderson, El Reno, sent a letter to Beeler reinstating his seniority at Wichita as requested *(but failing to mention that his Yardmaster job at Wichita had been abolished and that* Beeler was given official status, not subject to bargaining agreement), Plaintiff's Exhibit 4, R. 29, 88. Beeler was a member of the Yardmasters of America. An Agent-Yardmaster position was not considered an official position, R. 40.

Due to assuming of additional duties of Agent, Beeler was given title of Agent-Yardmaster and designated as subordinate employing officer, which was only change in his status of which he was informed, R. 72, Defendants' Exhibit D, R. 96, filed in U. S. District Court, August 11, 1947. Agent-Yardmaster was just a name, such as Agent-Operator but routine duties of Yardmaster prevailed as to his seniority, R. 48. Evidence shows that Beeler was never notified by Mielke or Rock Island that his status had been changed to that of official not subject to bargaining agreement, R. 47. During the 29 years he served as Yardmaster at Wichita, immediately prior to June 17, 1946, Beeler had been required to perform continuously all of the duties as Yardmaster at Wichita, Kansas. These duties consumed *ninety per cent of his time after January 1, 1938,* the remaining *ten per cent of his time was consumed by duties of freight agent,* for which Beeler received $20.00 per month additional, R. 45, 48, 49. The Court said:

> "The question under these contracts is whether he was a Yardmaster and performed most of his duties as Yardmaster." R. 48.

The evidence was that Beeler received increases in payroll as Yardmaster and only $20.00 per month straight time for agent's duties, R. 48, 49. Beeler performed all duties of Yardmaster during 1917 and World War I and period of World War II, December 7, 1941, up to June 17, 1946, *without any aid* or assistance. Wichita and Cline Yard *not a division point* on Rock Island, R. 43. Under collective bargaining agreement of January 1, 1938, Beeler was required to work twelve hours per day as Yardmaster, Plaintiff's Exhibit 3, Assignment, R. 28, 87. That under the agreement of May 20,

1944, he was required to work *eight hours per day,* Plaintiff's Exhibit 2, Article 8, R. 27, 76. That Beeler continued after June 1, 1944 to work same schedule of *twelve hours per day* as set forth in January 1, 1938 agreement, increasing same sometimes to twenty hours per day, R. 45. From the evidence, the Court concludes:

> "That he (Beeler) was paid as Agent-Yardmaster and he (Beeler) contended that most of his duties were as Yardmaster." R. 54.

Beeler made one to five trips from Wichita to Cline daily, a distance of over three miles and drove almost daily from one yard limit to the other, a distance of over eight miles of switch tracks and right of way in his duties of Yardmaster, R. 33. That Beeler personally supervised one engine and *three crews of five men each;* and four crews of five men each during the wheat harvest during month of August, R. 32, 41, 55. That he handled movements of trains in and through the yards, R. 42, 43. That Beeler on date of discharge, June 17, 1946, was never relieved as Agent-Yardmaster, only as Agent, R. 44, 89. He worked many days eighteen hours, seldom less than twelve hours, R. 45. Plaintiff discharged June 17, 1946, Plaintiff's Exhibit 7, R. 44, 89. The Court stated:

> "The only question is whether under collective bargaining agreement, he is Yardmaster or Agent." R. 52.

Beeler exercised his rights under his seniority as Yardmaster at Wichita on date of discharge, not knowing at the time that his Yardmaster job had been abolished by negotiations on February 3, 1939, Plaintiff's Exhibit 8, R. 44, 89. The Court said:

"It is a question of construction of contract or contracts." R. 51.

The Rock Island refused to permit Beeler to exercise his seniority as Yardmaster at Wichita, Kansas, Defendants' Exhibit C, R. 46, 95. The collective bargaining agreement states that Yardmasters will not be disciplined or *dismissed without hearing before Superintendent,* R. 47, Plaintiff's Exhibit 2, Article 12, R. 27, 79.

TESTIMONY OF G. E. MALLERY

G. E. Mallery was Manager of Personnel for Rock Island at Chicago and defendant, *Rock Island's only witness,* whose work consists of negotiating labor agreements under provisions of the Railway Labor Act and pertaining to handling with organizations, grievances arising under negotiated agreements and who had been so engaged since 1920, R. 55. That said Mallery participated in negotiating agreements of 1938, 1939, 1944 and 1947 for Rock Island. That the first written agreement was in 1927. That the first agreement was enactment of Railway Labor Act as amended June 1, 1934, also in 1935, R. 55. That the Transportation Act of 1920, established the Interstate Commerce Commission *as authority to designate employees,* subordinate officials and officials, employees and subordinate officials are entitled to representation by labor organizations and officials are not. That the Interstate Commerce Commission set out in ExParte 72, classifications of employees, subordinate officials and officials, including supervising agents. There was a Yardmaster position at Wichita, January 17, 1917 to February 3, 1939. *Beeler was the man wanted at Wichita, R. 56.* After 1935, labor agreements were negotiated with Rock Island Yardmasters which gave seniority to Yardmasters then employed

as such, R. 57. January 1, 1938 agreement provided that *seniority for Yardmasters should extend throughout the entire railroad;* in other words, *if a position was bulletined at Manley, Iowa, Beeler could have bid it in and could have been assigned to it had he been senior bidder* (had Beeler known job of Yardmaster was abolished February 3, 1939, with thirty-two years seniority, Beeler could have taken the opportunity to bid by bulletin any job on the system which his seniority rights would have qualified him under the 1938 agreement, but having no notice of the abolishment of the job of Yardmaster at Wichita, Kansas and continuing to perform the duties of the same, he was never given any opportunity to exercise his seniority rights under the 1938 agreement, because Rock Island wanted him at Wichita) R. 57.

> "We abolished the job at Wichita and *added the duties of Yardmaster to Agent.*" R. 57.

Agreement with Mielke that Beeler be Agent-Yardmaster as supervisor. He was not subject to bargaining agreement, R. 58, agreement in writing, Defendants' Exhibit B, R. 43, 94, signed by F. H. Frey and accepted by W. F. Mielke, shows on the face of it that Beeler was not a party to the contract, R. 59. Mallery:

> "Wichita wouldn't be considered a primary breakup or makeup yard." 59.
>
> "The practice of station agents supervising switching service at various points will not be changed or considered as affected by this agreement, but the practice will not be extended to points where yardmasters are now assigned for the purpose of displacing yardmasters." R. 60, Plaintiff's Exhibit 2, Article 1, R. 27, 77.

Mallery:

> "Not my prerogative to notify Beeler of February 3rd letter . . . not my obligation to notify him." R. 61.
>
> Q. Was this agreement (February 3, 1939) officially altered under the rules of collective bargaining by giving thirty days notice of a desire to change a particular status?
>
> A. (Mallery) Yes, Sir. (No thirty days notice was given Beeler of meeting of February 3, 1939, as required in collective bargaining agreement of 1938, Plaintiff's Exhibit 3, Article 13, R. 28, 87)
>
> Q. Have you got that notice?
>
> A. No, I don't have it. I don't have the whole file. I have the confirmation of it. (Never produced confirmation in evidence. R. 62).
>
> Q. Was any notice given to Mr. Beeler that it was held?
>
> A. No notice was necessary to him. R. 62.

Mr. Mielke was certified to Rock Island as authorized representative of the Yardmasters on the Rock Island railway, R. 62, 63. Mallery:

Letter of February 3, 1939, termed contract, R. 63. Yardmaster job officially abolished February 3, 1939. Job was abolished in Mr. Mallery's office between Mr. Frey and Mr. Mielke, authorized representative of Yardmasters of America, R. 63. Job of Agent was under agreement of February 3, 1939, R. 63.

> Q. And that is what you have created in the agreement of March 16, 1947?
>
> A. No, that is what was *created through the collective bargaining agreement of February 3, 1939*. R. 64.

Beeler's salary increased $20.00 per month.

Q. Wasn't there one at Herrington?

A. Yes, Sir, but he has no seniority rights to the position at Herrington or at any place on the Rock Island railway outside of Wichita, Kansas. *The 1938 agreement* gave Mr. Beeler and all other Yardmasters *system seniority rights.* The 1944 agreement took away from Mr. Beeler and all other Yardmasters system seniority rights and provides only for rights at individual yards. R. 65.

Mallery:

"Any place we had a Yardmaster on the date of this 1944 agreement, thereafter the Carrier was prohibited from abolishing the position of yardmaster and establishing the position of train master in the yard." R. 66.

Q. And the paragraph above.

A. 'The practice in the various yards in regard to the character of work permissible or duties assigned to positions filled by supervising officers (regardless of title), who may be in direct charge of various terminals, and which positions are not covered by this agreement, is recognized as proper.' R. 67 Plaintiff's Exhibit 2, Article 1, R. 27, 77.

Mallery denied that Beeler had been Yardmaster for thirty-nine years, including negotiated agreement of January 1, 1938, R. 67. Mallery:

"There was no Yardmaster position to protect." R. 67.

The Court said:

"If he is a Yardmaster the suspension didn't affect him under that order." R. 67.

Q. Performing ninety per cent of his duties as Yardmaster, and ten per cent as Agent?

A. Under the negotiated agreement, if he *did one hundred per cent yardmaster work,* it didn't make any difference. His authorized representative

agreed that his job was not covered by any labor agreement. R. 68.

Q. Could you show the Court by your records the order or the bulletin the company published at the time you abolished the job at Wichita, Kansas?

A. Yes, sir.

Q. Is that the regular, standard procedure in that instance where you abolish a job like Yardmaster at a station such as Wichita?

A. There wouldn't be any abolishing notice necessary, if you abolish the job by agreement with the General Chairman, as we did in 1938. (Negotiated on February 3, 1939.)

Q. That is the procedure you would exercise in anybody's case such as Mr. Beeler's case, would it not?

A. I don't believe the agreements of the Yardmasters call for any notice. (see Plaintiff's Exhibit 3, Article 13, R. 28, 84.)

Q. You didn't give him any notice?

A. I don't know.

Q. Is it customary with your railroad, where they do abolish a job, to give such notice?

A. That can be by agreement with the authorized representative. If you mean that we could go out and abolish a yardmaster job without saying anything to anybody that is not proper procedure. R. 69.

Beeler had his watch checked twice per month because he was connected with the movement of trains. R. 69.

Q. No notice was given to Mr. Beeler at all? This agreement was between you and the Yardmasters representative?

A. I don't know whether any notice was given him.

Q. Your record does not disclose it?

A. No, sir.

Q. You did not give any such notice?
A. No, sir.

Q. This relation of Agent-Yardmaster was created when?

A. ExParte No. 72 in February, 1921, following the Transportation Act of 1920, described the meaning of the term employee and subordinate officials. The Interstate Commerce Commission held hearings under ExParte No. 72 setting forth classifications of agent. The regular agents were covered by contract. The agents at important stations, where they still were not in charge of large, important stations, where they had *certain detailed work to do,* they were subordinate officials, and they are entitled to representation. (Beeler was in this classification.) At the larger and more important stations, they were designated and classed as supervisory officers not subject to the provisions of any contract . . . the Interstate Commerce Commission didn't designate who was an officer *but did say who were employees* and *subordinate officials."* R. 70

Mr. Cowick, President of Yardmasters of America on July 18, 1946, claimed to Rock Island that Carrier had violated Yardmaster agreement and *asked for restitution to Beeler of all time lost,* Plaintiff's Exhibit 10, R. 54, 90 (showing that the organization recognized Beeler as Yardmaster at Wichita and had no notice of the abolishment of job, not subject to any agreement.) R. 71. No similar Yardmaster job was abolished without notice. Many cases involving seniority but not job involving Yardmaster. (Beeler's request was for reinstatement of seniority only.) Beeler complained to Mr. Mielke that he wasn't properly treated in his seniority and Mielke handled it with F. H. Frey. R. 76.

No notice was received that job was abolished at Wichita. Beeler did receive notice from Superintendent Henderson that his seniority was restablished as requested, Plaintiff's Exhibit 4, R. 29, 88 (this being the only official letter from Superintendent Henderson regarding his inquiry). This could be the only source of information relative to the abolishment of the job and it can be seen from the content of the letter that there is nothing said regarding abolishment of Beeler's employment. (Petitioner believes that Superintendent Henderson had received no copy of February 3, 1939 agreement; instrument shows no copies sent, Defendants' Exhibit B.)

SUMMARY MATTERS TO BE TAKEN INTO CONSIDERATION

1a. The first summary matter to be taken into consideration is the inconsistency of the collective bargaining agreement of January 1, 1938, with the intents, purposes and requirements of the Railway Labor Act.

The Yardmasters of America and defendant, Rock Island railroad, executed and entered into a collective bargaining agreement, being effective January 1, 1938. This agreement in substance applied to all Yardmasters on defendants' railroad. Beeler, petitioner herein, had been duly appointed by the defendants and had been performing duties of Yardmaster for defendants over a continuous period of thirty-one years prior to date of said agreement, last twenty-one years at Wichita, Kansas. In Article 13 of said agreement, R. 85, the same states:

> " . . should either of the parties to this agreement desire revision or modification of these rules, thirty days written notice *shall be given such desire.*"

The Railway Labor Act, Title 45 USCA, Para. 156 states:

> *"Carriers and representatives* of employees *shall give at least thirty days written notice* of an intended change in agreements affecting rates of pay, rules or working conditions, etc."

The failure of notice under the Act has been defined by the Court as follows:

> "A failure of carrier to proceed as provided by this chapter leaves agreement with employees in force, and no wage cut may be imposed unless provisions of this chapter are first obeyed." *Chicago North Shore & M. R. Co.,* C. C. A. Ill. 1945, 147 F. 2d 723, *certiorari denied* 65 S. Ct. 1089, 325 U. S. 852, 89 L. ed. 1973.

The Federal District Court found that the petitioner herein had no notice whatsoever of the negotiations in collective bargaining agreement of February 3, 1939, Para. 7, R. 16. Article 13 of January 1, 1938 agreement does not set out that *notice shall be given in agreements affecting rates of pay or working conditions,* but only as to *rules* and petitioner believes that Article 13 conflicts with Para. 156, Title 45 USCA of the Railway Labor Act, inasmuch as the working conditions of the petitioner herein had been materially affected by February 3, 1939, collective bargaining agreement.

Petitioner further believes that the procedure used in executing the February 3, 1939, agreement was contrary to procedure set forth in the Act and also contrary to the collective bargaining agreement of January 1, 1938 and that said collective bargaining agreement of February 3, 1939, was thereby void, without force and effect, in changing the status of Beeler to that of official from Agent-Yardmaster. That all of the foregoing was inconsistent with and contrary to the intents, requirements and purposes of the Railway Labor Act as amended in 1934, and the rulings under ExParte No. 72 of the Interstate Commerce Commission.

The collective bargaining agreement of February 3, 1939, is inconsistent in the following respects: (1) In attempting to change the status of petitioner, Beeler, from employee to an official position. (2) In establishing his status not covered by a working agreement, Defendants' Exhibit B, R. 43, 94. That said collective bargaining agreement of February 3, 1939, was inconsistent with the intents, purposes and requirements of the Railway Labor Act for the reason that Beeler, petitioner, was deprived of his Yardmaster classification as employee, and was the only party concerned therein as an individual employee, *was not made a party to the said agreement,* and had not authorized W. F. Mielke to accept same as set forth in Defendants' Exhibit B, R. 43, 95.

The collective bargaining agreement of May 20, 1944, was inconsistent with the Act, in that petitioner, Beeler, herein had performed all duties of Yardmaster for the defendants at Wichita up to and including June 1, 1944,

effective date of said agreement and agreement stating, Article 1, Plaintiff's Exhibit 2, R. 27, 76:

> "The practice in various yards in regard to the character of work permissible or duties assigned to positions filled by supervisory officers (regardless of title), who may be in direct charge of various terminals, and which positions are not covered by this agreement, is recognized as proper, but, the practice will not be extended to points where yardmasters are now assigned to displace such yardmasters."

Petitioner, Beeler, was assigned Yardmaster at Cline Yard, January 1, 1938, by said defendants *under written assignment* at a fixed salary of $290 per month and twelve hour working day, Plaintiff's Exhibit 3, R. 87. There was nothing in the purported February 3, 1939 collective bargaining agreement which established a change in rates of pay, or working conditions, therefore, inasmuch as petitioner, Beeler, performed the routine duties of Yardmaster in their entirety, as Agent-Yardmaster *(regardless of title)*, it was not proper *to displace him as Yardmaster* because he had performed the duties of Yardmaster for defendants and therefore, said paragraph of said Article is inconsistent with the intents, purposes and requirements of the Railway Labor Act and ExParte rulings therein, as set forth in Title 45 USCA, Para. 151 (5) and 151 (a). Agreement further states therein:

> " . . . that *positions not recognized by this agreement are proper,*"

would be inconsistent with intents, requirements and purposes of the Act for the reason that it is retroactive in its content and directly in conflict with the purposes of collective bargaining agreements which has only to do with the future. The Court states:

> "To settle *for the future alone* without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred independently of the power to deal with grievances, as part of the power to contract 'concerning rates of pay, rules or working conditions.' It includes the power to make a new agreement settling for future a dispute concerning the coverage or meaning of a preexisting collective agreement . . . But it *does not* cover changing them *with retroactive affects* upon accrued rights of claims. For it is precisely the difference between making settlements effective *only for the future* and making them *effective retroactively* to conclude rights claimed as having already accrued which marks the statutory boundary between *collective bargaining* and the *settlement of grievances*. The latter by explicit definition includes the 'interpretation or application' of existing agreements. To regard this as part of the collective bargaining power identifies it with making new agreements having only prospective operation." Section 739, *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 89 L. ed. 1903.

In said collective bargaining agreement, it further states:

> "That the practice of station agents supervising switching service at various points will not be changed or considered as affected by this agreement but the practice will not be extended to points where Yardmasters *are now assigned for* the purpose of displacing Yardmasters."

Petitioner Beeler was assigned duties of Yardmaster under written assignment of January 1, 1938 and if the said collective bargaining agreement of February 3, 1939 is of no avail and void, then petitioner Beeler was still assigned as Yardmaster at the time said collective bargaining agreement of June 1, 1944 was effective and cannot be displaced as set forth in said agreement. However, the inconsistency of this agreement with the Railway Labor Act is shown in view of the fact that petitioner, Beeler's *duties have always been that of supervising the switching service at Wichita,* Kansas . . . that being the duties of Yardmaster. The only supervisory job, according to the evidence in this case, was that Beeler *was supervising the Freight Agent's office* in addition to his Yardmaster duties. This petitioner believes, the said clauses in Article 1, Plaintiff's Exhibit 2, R. 76 thereby conflicts with the intents and purposes and requirements of the Railway Labor Act, as amended in 1934. The employee had always performed all of the duties of Yardmaster, in addition to supervising Freight Agent's office after January 1, 1938, and said collective bargaining agreement, in considering petitioner's position of Agent-Yardmaster not subject to collective bargaining agreement, would defeat the intents, purposes and requirements of the Act under collective bargaining, in not protecting Yardmaster, who continued to perform all of the duties of such position. Besides, Beeler was never a station agent. He was a Yardmaster supervising the duties of Freight Agent and was not in charge of the Wichita terminal, Para. 5, R. 15.

1b. The evidence shows that Beeler performed all of the duties of Yardmaster at Wichita from January 1, 1917 to June 17, 1946. That on January 1, 1938, under an oral order made by officials, Brown and Franklin of

defendant railroad, he was ordered to take on the additional duties of supervising the freight office upon the retirement of Freight Agent Lusk, R. 25, Defendants' Exhibit A, R. 37, 92. The evidence shows that the Yardmaster duties consumed *ninety per cent* of the petitioner's time as Agent-Yardmaster; that the added duties of supervising the Freight Agent's office was *ten per cent* of his time, R. 45, 68. That the salary of the petitioner for performing Yardmaster duties was *$280.00 per month* and that in accordance with the oral order, defendants paid Beeler an additional *$20.00 per month* for the performance of the additional duties of Freight Agent, R. 25, 57, 64, 87. This definitely showed that the petitioner's payroll should be classified as an employee under ExParte 72 of the Interstate Commerce Commission rulings, 374 Vol. 4 under heading of *'Routine Duties'*, in order to be consistent and meet intents, purposes and requirements of the Railway Labor Act, as amended in 1934. The evidence clearly shows that Beeler's *former employment as Yardmaster never ceased*. Mr. Mallery, representative of Rock Island and the only witness in this case for defendants, evidence showed petitioner was required to perform all of the duties as Yardmaster in addition to that of Freight Agent,

> "We abolished the job at Wichita and added the duties of Yardmaster to Agent," R. 57.

Mr. Mallery refers many times to ExParte 72 of the Interstate Commerce Commission which, he testified, is a controlling factor to employees, subordinate officials and officials, R. 70. From his evidence alone, it conclusively shows that the petitioner, Beeler's classification should be that of Yard-master, inasmuch as the

Yardmaster duties were his routine duties. This is established by the fact that *ninety per cent of his duties* were Yardmaster and *ninety per cent of his salary* was that of Yardmaster. ExParte 72, R. 121, see 3374 ICC Annotated, Vol. 4 states:

> "The duties and responsibilities of supervisory station agents vary so widely that they cannot all be consistently designated subordinate officials. This class will be subdivided, therefore, as follows:
>
> "(a) Routine Duties. *Supervisory station agents,* who, in addition to their supervisory duties, are required to perform work usually performed by telegraphers, telephone operators, ticket sellers, bookkeepers, towermen, levermen *or similar routine duties are employees* and although they may have supervision over one or more other station employees, cannot be properly designated subordinate officials."

Mallery testified where agents are at important station, but not in charge of large important stations, where they have certain detailed work to do, they are subordinate officials and entitled to representation and collective bargaining agreement, R. 70. Certainly Beeler is in this classification. Mallery also testified that Beeler received $20.00 per month in addition to his Yardmaster salary which was $280.00 per month. Beeler signed his employment application, Form G126 on January 3, 1938, Defendants' Exhibit D, 96, as "Subordinate Employing Officer", the same approved by Henderson, Division Superintendent, showing that Beeler's rank was under that of Division Superintendent. Under 266 I. C. C. 57, the Commission states:

> "Generally speaking, railroad employees *below the grade* of Division Superintendent are consider-

ed to be *subordinate officials or employees* as the case may be."

The Federal District Court or the Court of Appeals has no authority to define Beeler as an official and the Court says:

> "Every person in service of a carrier is not an 'employee' within subsection (5) of this section and 152 (4, 9) of this title, though subject to carrier's continuing control and authority, but only those *who perform work defined as that of an employee* by existing or amended orders of Interstate Commerce Commission, and the authority thus to define employees is *not vested in National Mediation Board, nor courts." Natl. Council of Ry. Patrolmen's Unions v. Sealy,* C. C. A. Tex, 1945, 152 F. 2d 500.

It is desired that the Court particularly notice that this employment form did not include a statement of any character that the Agent-Yardmaster position approved by Division Superintendent Henderson was an official position at that time (January 3, 1938). Again in the Nashville, Tennessee case, 264 I. C. C. 315-317, the station master and assistant station master position were to be determined as to whether or not they were subordinate officials, subject to collective bargaining agreements, or officials. This station master supervised six switching crews, had charge of the Union Station building at Nashville, Tennessee, had three assistant station masters, one extra assistant station master, three mail supervisors, 110 mail handlers, 4 clerks, 6 gatemen, 3 elevator operators, one custodian and 21 station cleaners, all of whom he supervised. He also supervised the passenger train operations, the breaking up and making up of passenger trains at Nashville, Tennessee. Nash-

ville, Tennessee was considered by the Commission as a large and important station and switching center, and the respondents argued that the station master and assistant station masters were vested with authority and responsibilities that stamp them as officials. On Page 318, the Commission stated:

> "The record supports the conclusion and we find that the work of the aforesaid stationmaster and assistant station masters meets the description of that of subordinate officials . . . and section 1 (5) (Title 45 U. S. C. A., Para. 151) of the Railway Labor Act should be amended to include the work of the aforesaid stationmaster and assistant stationmaster."

This clearly contradicts Mallery's testimony: "where they still were not in charge of large important stations", and is a statement in direct contradiction of the I. C. C. ruling in the Nashville, Tennessee case. It is therefore clear that the petitioner's duties could not possibly be as important as the duties in the Nashville, Tennessee case. Therefore, at the most, the petitioner herein would be a subordinate official, if not an employee of the said defendant railroad and therefore, at the time of his discharge, June 17, 1946, would be subject to the terms of the collective bargaining agreement of June 1, 1944. Designating the petitioner, Beeler, an official would be inconsistent with and could not meet the requirements, purposes and intents of the Railway Labor Act as amended in 1934.

> "The provision of subsection (Fifth) of this section authorizing Interstate Commerce Commission to define and classify the work of an employee or subordinate official apart from the work of executives and officials to the end that the status of each under this chapter shall be determined by the

character of his work is unambiguous, so that there is no room for construction." *Brotherhood of Locomotive, Firemen & Enginemen v. I. C. C.,* 1945 147 F. 2d 312, 89 L. ed. 1981.

"The power of the Interstate Commerce Commission under subsection (Fifth) of this section is limited to determining whether an admitted wage-earner of an admitted carrier is to be classified as an employee, a subordinate official, or an official." *infra.*

Employees, under the Railway Labor Act, Title 45 U. S. C. A., Para. 151 (5) and 151 (a) are necessarily given salary classifications due to their routine duties as set forth in I. C. C., ExParte 72. The petitioner therefore believes that he is entitled under collective agreement to classification of Yardmaster. The Court has said:

"Under collective bargaining agreement concerning employment of train dispatchers, railroad was not obligated to create or reestablish any particular position and employees rights would be invaded only when he failed to receive the payroll classification to which he was entitled by reason of the duties performed." *Crowley v. Del. & H. Ry. Corp.,* 63 Fed. Supp. 164.

The collective bargaining agreement of February 3, 1939 was null and void. The Court says:

"Any sanction of individual agreements contrary to terms of collective agreement between carrier and employees should not be permitted under this chapter." Order of R. R. Telegraphers v. Railway Express Agency, D. C. Ga. 1942, 55 F. Supp. 319, Reversed 137 F. 2d 46, reversed 64 S. Ct. 582, 321 U. S. 342, 88 L. ed. 788.

The Court goes on to say:

> "A collective agreement between employee and employer is not a local matter, because of the subject matter and federal legislation touching it, a Federal court is bound to exercise independent judgment and the Supreme Court of the United States has final authority . . . Seniority provisions of the collective agreement is an important and valuable part of individual contract of employment made thereunder, which union cannot waive or destroy." *Ill. Cent. Ry. Co. v. Moore,* 112 Fed. 2d 959.

1c. The petitioner Beeler herein, worked continously, performing all of the duties of Yardmaster for 31 years immediately prior to January 1, 1938. Under the oral order, he was given on that date, additional duties as Freight Agent in the same office in which he had been Yardmaster for the past 21 years, which additional duties consumed approximately ten per cent of his time. Mr. Mallery testified that Mr. Beeler *was required* by defendants to perform all of the duties of Yardmaster in addition to those of Agent from January 1, 1938. Not only was he required to perform all of the duties, but he was also assigned Yardmaster duties under written assignment, Plaintiff's Exhibit 3, R. 28, 87, at a stipulated amount of $290.00 per month in the Cline Yard, twelve hours per day. Now the question before us is *if Mr. Beeler, the petitioner, was required by defendant employer to perform all of the duties of Yardmaster as he had in the past, under the law, could Rock Island abolish the Yardmaster job, unless they abolished the duties,* without defeating the purposes of the Railway Labor Act. The Court says on the matter of work performed:

> *"Performance and not existence of the duties is the essential preface to railroad's obligation under the collective bargaining agreement* to reclassify train dispatcher and to dispatcher's right to maintain action under Railway Labor Act, his legal rights must be determined in accordance with the law of contracts and plaintiff must establish that employer breached bargaining agreement; majority of duties performed as dispatcher rules as to his classification and railroad cannot deprive dispatcher of job." *Crowley v. Del. & H. Ry. Co.*, 63 F. Supp. 162, 164.

In this case, dispatcher had not performed the duties of dispatcher. The fact that the duties existed and were not performed, did not give the dispatcher the privilege to be reclassified inasmuch as he had never performed the duties. In *Hanks v. Del. & H. Ry. Co.*, 63 Fed. Supp. 161, the plaintiff had performed the duties of dispatcher and therefore, the court held that he should be reclassified as dispatcher under payroll classification as such. It is the petitioner's belief that the performance and not the existence of the duties is the essential preface to the railroad's obligation under collective agreement and where the petitioner continued to perform all of the duties of Yardmaster, and was a member of Yardmasters of America from the union's inception, that it cannot be said that he is not entitled to the payroll classification of Yardmaster and employee in the defendants' employment herein. Otherwise, it would defeat the very purposes, as well as the intents and requirements of the Railway Labor Act and deprive this petitioner of his rightful classification of Yardmaster under the said agreement.

2. The petitioner wrote a letter to Mr. Mielke, general chairman of Yardmasters of America at Chicago, Defendants' Exhibit A, R. 37, 92, and requested of him that his seniority be changed as Yardmaster from Caldwell, Kansas to Wichita, due to a listing in a bulletin from Superintendent Henderson's office, *January 30, 1939*. Back in January, 1939, the petitioner stated that he was ordered to perform Agent's duties January 1, 1938, in addition to Yardmaster duties. The only request that petitioner made in this letter to Mr. Mielke was that he straighten out his yardmaster seniority. Mr. Mielke conferred with the defendants, employer, and in a negotiation, *the pretended collective bargaining agreement of February 3, 1939 was negotiated*. This agreement in substance attempted to deprive this petitioner of his classification of Yardmaster under the collective bargaining agreement of January 1, 1938, and to abolish the position in its entirety. The Court says:

> "This chapter places upon carriers and employees duty of exerting every reasonable effort to settle disputes by agreement *and prohibits carrier from altering rates of pay, rules or working conditions except in manner provided by agreement* or by this chapter." *Shipley v. Pittsburgh & L. E. R. Co.*, 70 F. Supp. 870.

As stated before, the defendants and representatives of the union, without knowledge, authorization, ratification or notice to this petitioner, an individual employee Beeler, agreed to collective bargaining agreement regarding individual employment of employee, this petitioner never being permitted to be a party to the same. Mr. Mielke accepted the same in behalf of this petitioner without any ratification from him, Defendants'

Exhibit B, R. 43, 95. That this deprived the petitioner of the protection of his rights under the Railway Labor Act, as to privileges of his seniority and conflicted with the procedures set forth in Article 13, Plaintiff's Exhibit 3, R. 28, 84 and Title 45 U. S. C. A. Para. 156, requiring thirty days written notice for changes of rates of pay and working conditions, the petitioner being deprived of his right of conference in his individual employment, and the Court says:

> "The right of conference by individual with employer under this chapter includes right to confer as an individual concerning claims that railway has failed to perform the individual's contract in which the right is embodied." *General Committee of Adjustment of Brotherhood of Locomotive Engineers for Pacific Lines of Southern Pac. Co. v. Southern Pac. Co.*, C. C. A. Cal. 1943, 132 F. 2d 194, 88 L. ed. 85.

It also deprived this petitioner of the right to protect his seniority, which is a personal property right, as interpreted, under due process and contrary to the Fifth Amendment of the Constitution of the United States. As to employee's seniority rights, although arising under collective bargaining agreement between employee union and employer, the Court states:

> "That an employee's seniority rights are individual employee's exclusive property and constitute property within the Fifth Amendment of the Constitution of the United States." *Primakow v. Railway Express Agency*, 56 F. Supp 413.

3. Mr. Mielke had no authorization to negotiate or confer with defendant railroad herein regarding any matter other than the reestablishment of petitioner's

seniority as Yardmaster at Wichita. Defendants' Exhibit B, R. 43, 94, a letter of February 3, 1939, collective bargaining agreement, *was never marked copy to Beeler,* as were all the other letters, Plaintiff's Exhibit 4, R. 29, 88. The Court has stated in 31 Am. Jr. 102, page 874, regarding modification of contract of employment:

> "It has been ruled that agreements between organizations of employees and their employers are not designed to place it within *the power of the organization to change or modify* the contract at pleasure, so as to affect injuriously the individual rights of its members theretofore secured by the agreement. This ruling is predicated upon the theory that the officers of labor unions *are not to be deemed the agents of the members,* so as to be able *to affect their individual rights.* Nor is the submission of questions involving such rights contemplated by the agreement of members of a union to comply with its rules and regulation and with the will of the lawfully constituted majority."

The Court goes on to say regarding collective agreements as to individual employee status, that they are to be considered as follows:

> "The terms of the collective agreement, as included in an individual labor contract, ought not to be construed narrowly and technically, *but broadly, as to accomplish its evident aims and protect both the employer and employee.* It has been held that such contracts are to be construed precisely as contracts between individuals." 31 Am. Jr., Para. 113 Page 878.

It is therefore believed by the petitioner that he should have been made a party to the collective bargaining

agreement of February 3, 1939, for the reason that the entire negotiation involved his employment as a single, individual employee and therefore, if he were not a party to the contract he could not be held responsible for the results of the negotiation any more than any other individuals who contract between themselves. It is also noted that he was not a party to the contract, Defendants' Exhibit B, R. 43, 94, nor does his name appear on the contract. The Supreme Court held as follows:

> "The fact that a union participates in negotiations with employer, *does not warrant a conclusion,* that a union was finally authorized by railroad employees to settle their grievances with their employer, *without employee concurring in any agreement settlement." Elgin, Joliet & Eastern Ry. Co. v. Burley,* 89 L. ed. 1886.

This was a minor dispute involving a grievance between the petitioner herein and the railroad employer. The Court has stated as follows:

> *"The so-called minor disputes,* on the other hand, *involving grievances,* affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or *arise incidentally in the course of an employment.* They represent specific maladjustments of a detailed or individual quality. They seldom produce strikes, though in exaggerated instances they may do so . . . Broadly, the statute as amended marks out two distinct routes for settlement of the two classes of dispute, respectively, each consisting of three stages. *The Act treats the two types of dispute alike in* requiring *negotiations as the first step toward* settlement and therefore in contemplating voluntary action for both at this stage, in the sense that agreement is

sought and cannot be compelled. To induce agreement, however, the duty to negotiate is imposed, for both grievances and major disputes." infra, Sec. 724, page 1895.

In this case, *it was a minor grievance relative to seniority classification at Wichita and change of status of individual employment.* The Court goes on to say; *infra,* Sec. 733, page 1899:

> "Accordingly, petitioner urges that the statute, both by its terms and by its purpose, confers upon the collective agent the same exclusive power to deal with grievances, whether by negotiation and contract, or by presentation to the Board when agreement fails, as is given with respect to major disputes. And the aggrieved employee's rights of individual action are limited to rights of hearing before the union and possibly also by the carrier.
>
> "We think that such a view of the statute's effects, in so far as it would deprive the aggrieved employee of effective voice in any settlement and of individual hearing before the Board, *would be contrary to the clear import of its provisions and to its policy.*
>
> *"It would be difficult to believe* that Congress intended, by the 1934 amendments, to submerge wholly the individual and minority interests, with all power to act concerning them, in the collective interest and agency, not only in forming the contracts which govern their employment relation, but also in giving effect to them and to all other incidents of that relation. Acceptance of such a view would require the clearest expression of purpose. For this would mean that Congress has nullified all pre-existing rights of workers to act in relation to their employment, including perhaps even the fundamental right to consult with one's employer, except as the collective agent might permit."

This is exactly what Mr. Mielke, of the Yardmasters of America, and Mr. Frey of Rock Island employer did in this case. They took it entirely out of the hands of Mr. Beeler and decided to settle the matter themselves without any notice or knowledge to Mr. Beeler whatsoever. In fact, the Rock Island went so far as to have Mr. Henderson, Division Superintendent, send a letter to Mr. Beeler, Plaintiff's Exhibit 4, R. 29, 88, which contained the name of Mr. Frey, acknowledging receipt of Mr. Beeler's letter, designating seniority as the subject and stating as follows:

> "We are arranging to carry Mr. Beeler on seniority roster at Wichita as Yardmaster with date of December 31, 1907."

Also Mr. Beeler received Plaintiff's Exhibit 6, R. 30, 89, a revised and corrected Yardmaster seniority list of the Oklahoma Division. Mr. Henderson requesting that receipt be acknowledged and advise if the point and date shown for him was correct, Plaintiff's Exhibit 5, R. 29, 88. Copy of this also was sent to Mr. Frey. In neither of these Exhibits did the defendant employer *in any manner show or indicate that anything other than the adjustment of petitioner's seniority had been negotiated at Chicago.* Defendant *sent no copy of collective bargaining agreement of February 3, 1939 to petitioner,* as they did other letters. Therefore, after receiving Plaintiff's Exhibit 4, 5 and 6, and his seniority had been shown at Wichita instead of Caldwell, he believed his position as Agent-Yardmaster had been readjusted to former status of January 1, 1938, and having no notice of the abolishment of his job or the fact that he was not subject to collective bargaining agreement, did not know that said job was abolished at the time of

his discharge, June 17, 1946, as he testified, R. 73. Considering the petitioner, Beeler's, contract of employment with defendant railroad as a contract between individuals, the Court has held there must be a right of conference.

> "Rights of conference are not identical with rights of settlement. But the purpose of conference and the duty to treat is to bring about agreement. The right and the obligation to share in the negotiations are relevant to their aim. Conceivably the statute might confer the right to participate in the negotiations, that is, to be heard before any agreement is concluded, either upon the collective agent or upon the aggrieved employee or employees, at the same time conferring upon the other the final voice in determining the terms of the settlement. That is, in effect, the position taken by each of the parties in this case. But they differ concerning where the final say has been vested.
>
> *"His rights, to share in the negotiations, to be heard before the Board, to have notice, and to bring the enforcement suit, would become rights more of shadow than of substance if the union, by coming to agreement with the carrier, could foreclose his claim altogether at the threshold of the statutory procedure.* This would be true in any case where the employee's ideas of appropriate settlement might differ from the union's." *Elgin, Joliet & Eastern R. Co. v. Burley,* 89 L. ed. 735-1901.

There could be no way in which the defendant railroad employer and the Yardmaster representative could effectively negotiate contrary to the authorization of this petitioner. The Court goes on to say:

> "Congress made no effort to deal specifically with these variations. But whether or not the collective agent has rights, independently of the ag-

grieved employee's authorization, to act as representative of the collective interest and for its protection in any settlement, whether by agreement or in proceedings before the Board, *an award cannot be effective as against the aggrieved employee unless he is represented individually in the proceeding in accordance with the rights of notice and appearance or representation given to him.* Those rights are separate and distinct from any the collective agent may have to represent the collective interest." *Infra,* Sec. 738, Page 1902.

In protection of individual employee rights under collective bargaining, the Court further states:

> *"The collective agreement could not be effective to deprive the employees of their individual rights.* Otherwise those rights would be brought within the collective bargaining power by a mere exercise of that power, *contrary to the purport and effect of the Act* as excepting them from its scope and reserving them to the individuals aggrieved. In view of that reservation *the Act clearly does not contemplate that the* rights saved may be nullified merely *by agreement between the carrier and the union.*
>
> "Nor can we say as a matter of law that the mere making of *complaints through local Brotherhood officials amounted to final authorization to the union to settle the claims* or represent the employees before the Board. Neither the statute nor the union's regulations purported to give these effects to that conduct . . . More than this would be required to disclose unequivocal intention to surrender the individual's right to participate in the settlement and to give the union final voice in making it together with exclusive power to represent him before the Board." *infra,* Sec. 744, page 1905.

The Court further said relative to notice of negotiations:

> " . . . since it is conceded also that *they were not given notice* of the proceedings *otherwise than as the union had knowledge of them;* and since further they have denied that they had knowledge of the proceedings and of the award was effective in any manner to affect their rights must be determined in the further proceedings which are required. The crucial issue in this respect, of course, will be initially *whether respondents had authorized the Brotherhood in any legally sufficient manner* to represent them, individually, in the Board's proceedings in Docket No. 7324." *Elgin, Joliet & Eastern Ry. Co. v. Burley,* 89 L. ed. Section 748, page 1908.

The position taken by the defendant Rock Island as determined by Mr. Mallery's testimony is that the representatives of the union are the only parties with which he can settle disputes of employment or on individual contracts. He says:

> "We just cannot and do not, under the law, deal with an individual employee. We have to deal with his authorized representative, under the law, and Mr. Mielke was certified to the Rock Island railroad as the authorized representative of the Yardmasters on the Rock Island Railway. If Mr. Beeler walked into my office and said that he wanted to take a reduction in his salary, I couldn't do that. He didn't have any right except such as he received from the negotiated contract." R. 62.

The Court relative to union binding individual employee, has said as follows:

"Upon the theory that a union is not an organization for the purpose of conducting any business enterprise, it has been held that a union, as an organization, *cannot make a contract for its individual members in respect of the performance of work and payment for it,* and that contracts entered into by officers of the union *are not binding upon the individual members in the absence of a relation of agency* between the officers and members, or a ratification of the contract. The officers of a *union cannot create, either by work or contract, a binding bargain in behalf of the members of their union to furnish labor to be individually performed, unless they have been authorized by the members.*" 31 Am. Jr. 99, page 873.

The Court further states:

"The terms of a collective bargaining agreement between the Carrier and its employees under the Railway Labor Act of 1926, cannot be suspended or expanded by contract with individual employees, even though such individual contracts are only with a few employees specifically or uniquely situated.

"The company contends that special voluntary individual contracts as to rates of pay, rules and conditions of employment may validly be made, notwithstanding the existence of collective agreement, and the terms of the individual agreements supercede those of the collective bargaining one.

"If this were true, statutes requiring collective bargaining would have little substance for what was made collectively could be promptly unmade individually. It is said, the collective agreement affects relative few agents, and that those are specifically and uniquely situated. This apparently true, for application of collective agreement results in award of $40,000.00 to one agent over a period and

less than $2,000.00 to all others. But the company did not observe the representatives of the whole unit to be notified, and dealt with concerning a matter from which an employee's point of view may not be exceptional or which may provide a language for taking away other advantages of collective contract." *J. J. Case Co. v. N. L. R. B.*, 321 U. S. 332.

The Court further states:

"We hold that failure of carrier to proceed as provided by the Railway Labor Act of 1926, then applicable, left the collective bargaining agreement in force throughout the period and the Carrier's efforts to modify its terms through individual agreements are not effective" *R. R. Tele. v. Railway Express Co.*, 88 L. ed. 788.

The Court further states:

"The unions, apparently, like petitioner in this case, interpret the Act as *not contemplating two distinct systems* for the settlement of disputes, *one wholly collective for major disputes, the other wholly individual for minor ones.* In this view the collective agent becomes a party to the collective agreement by making it and its interest as representative of the collective interest does not cease when that function ends. It remains a party to the agreement, as such representative, after it is made; and consequently, in that capacity and for the protection of the collective interest, is concerned with the manner in which the agreement may be interpreted and applied." *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 89 L. ed. 724, page 1895.

Petitioner Beeler's case certainly was within the classification of grievance and not major dispute and therefore, should be treated as an individual contract between the

railroad and Mr. Beeler. It is therefore believed by the petitioner that the collective bargaining agreement of February 3, 1939, was void and of no effect inasmuch as Beeler was not made a party to the contract at the negotiations, the same being carried on by Mielke, general chairman of Yardmasters of America, and Rock Island, employer. If this is the case, then Mr. Beeler's employment as Yardmaster was certainly continuous and authorized under assignment of January 1, 1938, Plaintiff's Exhibit 3, R. 28, 87, and employment as Yardmaster was in full force on June 1, 1944, the effective date of the last collective bargaining agreement under which Mr. Beeler was employed, having been discharged on June 17, 1946. Therefore, said collective bargaining agreement of 1944 is inconsistent with and contrary to the requirements, aims and purposes of the Railway Labor Act as interpreted. The Court states as follows:

> "But the drastic effects in curtailment of his pre-existing rights to act in such matters for his own protection would be most obvious in two types of cases: one, where the grievance arises from incidents of the employment not covered by a collective agreement, in which presumably the collective interest would be affected only remotely, if at all; the other, where the interest of an employee not a member of the union and the collective interest, or that of the union itself, are opposed or hostile." *Elgin, Joliet & Eastern Ry. Co. v. Burley,* 89 L. ed. 736, page 1901.

This petitioner believes that he comes in the first type of cases, that where grievance arises from incidents of employment, which pertains to the pay and working conditions of the individual employee. It is therefore

believed by this petitioner that the defendant Rock Island and the bargaining representative of the Yardmasters *acted outside the scope of their authorization or consent of Beeler, the individual employee* and without his knowledge and made material alterations in employee's working conditions and status with said employer, attempting to bind said individual employee without said individual employee being a party to said negotiation and without ratification of said changes by said employee. This, the petitioner believes, transgresses the rights and privileges of said employee and defeats the entire purpose of the Railway Labor Act in protecting the said employee under the collective bargaining agreements.

4. Petitioner, Beeler, was employee of Rock Island on June 17, 1946 and inasmuch as a majority of his routine duties were that of Yardmaster at Wichita and had been continously for twenty-nine years prior to said date, petitioner was entitled to notice and hearing, as set forth in Article 12, Plaintiff's Exhibit 2, R. 27, 79, by his employer. That since he was not given proper notice and hearing of his grievance on the date of discharge, the said Rock Island *employer breached the said collective bargaining agreement* of May 20, 1944 and said petitioner, Beeler herein, *should be reinstated and compensated for any loss,* if any, as result thereof in employment after June 17, 1946, as set forth in said Article 12 of said agreement. First, the employee has a right to bring an action against the employer, as the Court states:

> "Employee *makes prima facie case* of showing *collective bargaining agreement, existence of duties of position, its abolishment* and *continuing of such duties as same office,* this constitutes a breach of

collective bargaining agreement entitling employee to relief in view of evidence of continuance of duties of such position." *Hanks v. Del. & H. Ry. Corp.*, 63 F. Supp. 161.

The defendants contention is that they had a *right to discharge* petitioner herein *because he was an official,* and petitioner's contention is that *he was an employee or subordinate official.* The Courts have said in this regard:

> "Under the Act, railroad who has a contract with union could *not discharge employee at will,* where the contract contained stipulation that *cause of discharge should be stated and hearing given,* implying that discharge was not to be had at will but only for just cause, of which railroad *officers were not the sole and final judges." Ill. Cent. Ry. Co. v. Moore,* 112 F. 2d. 959.

The Court further states in this respect:

> *"No employees coming under collective agreement should be dismissed or suspended without sufficient cause,* and complaint should be investigated, *restitution should be made* when action had been taken contrary to contract in force, employees coming under it had their tenure and rights governed by its terms, and for action contrary thereto had a right of action to redress their grievances, for purpose of passing on question whether plaintiff stated a cause of action, all well pleaded facts of petition were required to be taken on time." *System Fed. No. 59, etc. v. La. & H. Ry. Co.,* 30 F. Supp. 909, 119 F. 2d. 509

There was no opportunity for the petitioner Beeler to present his side of the case when he was discharged on June 17, 1946, by defendant employer. *He was given no*

opportunity to defend his means of livelihood and the Court says in this respect:

> "No man should be deprived of his means of livelihood without a fair opportunity to defend himself. Plainly, that is the intent of the law. The case at bar illustrates how a single employee may be caught between the upper and nether millstones in a controversy to which only a labor organization and courts are parties before the Board. *It is necessary for an employee to be named a party to the proceeding* before the Board involved in the controversy within the meaning of the law. Notice should be given in some adequate way to all persons who will be substantially affected by the order that may be entered by the Board unless notice is waived." *Estes v. Union Terminal Co.,* 86 F. 2d. 768.

The petitioner, Beeler, was never given an opportunity to enter into these negotiations with defendant employer. Certainly, he should have been given this privilege to protect his rights after 43 years service with the employer. In the Interstate Commerce Commission rulings, ExParte 72, termed 'Routine Duties', as set forth above, this petitioner believes there is no way in which this petitioner could be designated in an employment classification *other than that of employee* for said defendant employer, and at most, a subordinate official.

ExParte No. 72, I. C. C. Acts Annotated, Vol. 4, p. 3374:

> "(a) Routine Duties. Supervisory station agents who, in addition to their supervisory duties, are required to perform work usually performed by telegraphers, telephone operators, ticket sellers, bookkeepers, towermen, levermen, or similar rou-

tine duties are employees and, although they may have supervision over one or more other station employees, cannot be properly designated subordinate officials."

This is the question upon which the entire case hinges. If petitioner, Beeler, is an employee or subordinate official, according to testimony of Mr. Mallery of defendants, then he is subject to collective bargaining agreement regardless of the attempted abolishment and establishment of his official status in the February 3, 1939, collective bargaining agreement, by reason of the fact that said agreement would therefore be *contrary to the I. C. C. rulings,* under the Railway Labor Act, and therefore, contrary to law and void ab initio.

In computing the damages for loss of employment, petitioner Beeler's salary as Yardmaster was $361.87 on date of his discharge June 17, 1946, and computing up to October 17, 1948, his loss by reason of discharge, from employment would amount to $10,132.36 and $361.87 per month thereafter until restitution is made by the defendants, or in lieu thereof, if not permitted to return to employment, petitioner, Beeler's age being 65 with a life expectancy of 11.10 years, and due to the fact that under seniority rules on defendants railroad and other railroads, plaintiff would be unable to get similar employment, with loss of future earnings of 11.10 years, his life expectancy, at $361.87 per month or a total of $40,049.81. The testimony clearly showed that petitioner was physically able to hold down job of Switchman, R. 187, therefore, in the alternative, if the court decides on the life expectancy and payment for all time lost, petitioner's loss of future earnings are set forth above.

5. Mr. Beeler was considered Yardmaster, as far as all of the duties of the same were concerned at Wichita for 29 years continuously prior to his discharge June 17, 1946. He served under the written assignment of January 1, 1938, under the collective bargaining agreement of said date up to June 1, 1944, when he served under collective bargaining agreement of that date. This petitioner believes that the February 3, 1939 collective bargaining agreement is of no effect and void because it is contrary to the Railway Labor Act and I. C. C. rulings under ExParte 72 under said Act, and therefore, Mr. Beeler, being subject to collective bargaining agreement effective June 1, 1944, is entitled to overtime pay under the eight hour day set forth in said collective bargaining agreement, to date of petitioner's discharge as computed in Plaintiff's Exhibit 11, R. 54, 91, which as computed, amounts to approximately $9,620.80.

REASONS

1. The Circuit Court of Appeals decided an important question of Federal law which has not been settled by this Court. First, states in its opinion:

> "Conversely, apart from his automobile expense, he has no right of action outside the contract, and his discharge without a hearing was not an actionable wrong", R. 118.

The Court then cites *Littel v. Evening Star Newspaper Co.,* 120 F. 2d 36. This, however is a case wherein it does not apply to a railroad and therefore, has no significance under the Railway Labor Act. The Court further goes on to say:

> "The statute does not draw the line or prescribe the boundaries between *the collective interest* in which the bargaining representative *is authorized to act for the employee* and *the individual interest in which the employee is entitled individual representation with notice and opportunity for hearing.* Nor have the courts found *a ready formula for delimiting such authority.*" R. 119.

It is the petitioner's belief that *this Court should prescribe the boundary between collective and individual interests* and develop a ready formula for delimiting such authority on the part of the employer, by settling the matter in this court, such matters having been before the Court, *Elgin, Joliet & Eastern Railway Co. v. Burley,* 89 L. ed. 1886. This important question appeared to the petitioner to be satisfactorily covered in the above cited case, however, due to the importance of the question involved regarding the individual interest of an employee and in his representation and notice in individual employment negotiations, it is certainly a right which should be determined to safeguard the protection for the individual employee under his contract of employment with employer under the Railway Labor Act, as amended in 1934.

2. It is believed by this petitioner that the Circuit Court of Appeals decided a federal question in conflict with applicable decisions of this Court when it stated:

> "Rather, we think the agreement was merely recognition or confirmation of the general understanding that the position of Agent-Yardmaster at Wichita was an official position not covered by the working agreement."

If this were true, then the ICC ruling under ExParte 72, 'Routine Duties', would be of no avail or applicable

to any employee and the defendant employer could at will abolish a position such as Yardmaster and not abolish the duties of the same, requiring the employee to still perform all of the duties as he had in the past, and therefore, defeat the very intents, purposes and requirements of the Railway Labor Act. This, petitioner believes, is in direct conflict with the decisions as set forth in *Elgin, Joliet & Eastern Ry. Co. v. Burley,* supra. The Court further states:

> "The Act does not interfere with the normal right of the employer to select its employees or discharge them, or to create and abolish positions, so long as it does not impair the collective bargaining process." R. 119.

This, we agree with, but the petitioner herein was discharged not in accordance with the procedure of Article 12 of the collective bargaining agreement of June 1, 1944 but arbitrarily discharged without any hearing of any character as provided under 'Grievance and Discipline' in said Article. The Court further stated:

> " . . . agreement effective January 1, 1938, specifically recognized the right of the Company to 'establish and abolish' the position of yardmaster at any point on the system."

This petitioner, agrees with the said Court in this respect, however, that very agreement stated in Article 13 the manner in which to proceed to abolish the said Yardmaster job, which procedure and manner was not complied with by said Company. The Court further states:

> "It is suggested that Section 6 of the Railway Labor Act requires such notice, (Title 45 U. S. C.

A., Para. 156), but that Section providing for a thirty day written notice by carriers and representatives of an intended change in agreements affecting rates of pay, rules or working conditions, obviously has reference to matters affecting the collective bargaining process, and does not relate *to matters lying outside of its scope.*"

If this be the case as the court has stated, then the rule in *Elgin, Joliet & Eastern Ry. Co. v. Burley,* supra, applies definitely in that the Court above refers to major disputes while the petitioner herein pursues his course upon a minor contention, involving individual employment contract and grievance. Therefore, the petitioner believes in the above cited case, as a matter of law, he should have been given the *personal right to be made a party to negotiations of collective agreement of February 3, 1939* and opportunity *to ratification and to agree or approve its terms.*

3. Petitioner believes that the Circuit Court of Appeals has so far sanctioned the departure by a lower court as to call for an exercise of this Court's power of supervision over the findings and opinion of the said court. The Court of Appeals opinion states, R. 120:

> "While the 1938 agreement was in force and effect, the Company elected to abolish the position of yardmaster at Wichita, and to create the position of agent-yardmaster there, with an official status not within the collective bargaining agreement. The appellant accepted the position of agent-yardmaster at Wichita, and assumed the duties, with the express understanding that it called for a twelve hour day, without automobile expenses."

The District Court found that plaintiff, Beeler, *would not be allowed an expense account for use of his automobile,*

Para. 9, R. 16, and rendered judgment, R. 17, contrary to that finding. The Court of Appeals found no evidence relative to automobile expense, which is contrary to the finding of the District Court, Para. 9, R. 16 and other evidence at R. 32, 33. In the first place, the Agent-Yardmaster job, was result of an order in December, 1937, by officials of defendant railroad, Mr. Franklin and Mr. Brown, R. 25. This was also substantiated by Mr. Mallery and never contradicted in his testimony. Therefore, when the company elected to abolish the position of Yardmaster at Wichita, it had the proper procedure to pursue before it could be abolished, that is, the collective bargaining agreement then in force, on January 1, 1938. It must be remembered that for *thirteen months the petitioner worked under the original oral order of 1937* as Agent-Yardmaster up to the pretended abolishment of the job on February 3, 1939. The appellant, this petitioner, was ordered to take over the position of Agent-Yardmaster, in December, 1937 and was assigned Yardmaster duties. The twelve-hour day he necessarily performed by reason of the written assignment of January 1, 1938 which not only set forth the twelve hours he was to work but also the salary he was to receive and the duties to which he was assigned, that of Yardmaster at Cline Yard, all of which are set out in Plaintiff's Exhibit 3, R. 87. The official status was never added to the Agent-Yardmaster position nor was it indicated in the employment form — G126, Defendants' Exhibit D, R. 95, 96, which set forth the regular form of employment of Beeler by said defendants, giving the reason, it was effective January 1, 1938, on account of regular Agent A. Lusk, retiring, and executed at Wichita, Kansas on January 3, 1938, Defendants' Exhibit D, R. 95. This employment form, signed

by Mr. Beeler, never made any reference that the Agent-Yardmaster job at Wichita was to be a position of official status, not within the collective bargaining agreement. In fact, the petitioner Beeler, signed the application as "Subordinate employing officer." This appellant, petitioner herein, was subject to the May 20, 1944 collective bargaining agreement, effective June 1, 1944, for the reason that he believes the February 3, 1939 collective bargaining agreement is void, of no force and effect relative to rates of his pay, hours of service and working conditions, as established by his assignment, January 1, 1938. Petitioner further believes that at the time of the pretended abolishment of the Yardmaster position under the collective bargaining agreement of February 3, 1939, that due to petitioner's long years of seniority, he should have been given the opportunity to displace a junior Yardmaster in the terminal and if none was available, he would at least have had the right under the Railway Labor Act to have the determination of his particular status established at that time. The Court of Appeals states:

> "Of course the Company could not abolish the job of yardmaster *by merely changing the title"*, R. 120.

This follows in a measure our contention. In view of the fact that there was an understanding between Franklin and Brown of the defendant employer and the petitioner Beeler, that he was to continue to perform all the duties of Yardmaster as he had in the past at $280.00 per month and receive $20.00 additional pay for the added duties of Freight Agent, Mr. Beeler having been in the same office as the Freight Agent at Wichita for many years.

Another important factor of this law suit hinges on the point set forth in the opinion of the Circuit Court of Appeals, R. 120:

> "Section 1(5) of the Railway Labor Act (Title 45 U. S. C. A. 151 (5)), provides that the term 'employee' as used in the Act includes every person in the service of a carrier who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission then in effect, and as may be amended or interpreted by further orders . . . the Interstate Commerce Commission on February 5, 1924, entered ExParte No. 72, in which it undertook to classify supervisory station agents as officials and subordinate officials. The order pertinently provided that supervisory *station agents at large and important stations,* whose duties were *wholly supervisory,* and who were necessarily vested with greater responsibilities than agents classed as subordinate officials, might be designated officials and excluded from the class of subordinate officials."

This finding by the Court of Appeals is definitely contrary to the provisions as set forth in the Act. In ExParte 72, R. 121, the Court has copied in foot notes, ExParte 72, 'Supervisory Station Agents', (a), (b) and (c). Considering the duties of the petitioner Beeler as Agent and Yardmaster, considering that *ten per cent of* all of his duties were *those of Agent* and *ninety per cent of them, Yardmaster,* which is uncontradicted by the evidence of the defendants, and in fact, Mr. Mallery said that it mattered not whether he performed *one hundred per cent Yardmaster, R. 68.* It sets forth (a) Routine Duties, (b) Supervisory Duties and (c) Greater Responsibilities. There is nothing in the testimony of Mr. Beeler or Mr. Mallery which could possibly place

this petitioner under (c) Greater Responsibilities. As a matter of fact, Mr. Mallery, stated in his testimony that Wichita was a large and important station and he contradicted himself by saying that there was only one engine and one crew, that Wichita was not a division point, that it was not a place for breaking up and making up trains, that he was not in charge of the terminal, but his only added duties of supervision were those of Freight Agent, that he was required to perform in addition to his supervisory duties, all of the duties of Yardmaster. This testimony by the defendants' only witness, Mr. Mallery, definitely places the petitioner in classification (a) Routine Duties or (b) Supervisory Duties. The Routine Duties are described as follows:

> "Supervisory station agents who, in addition to their supervisory duties (Freight Agent's duties), are required to perform work usually performed by telegraphers, telephone operators, ticket seller, bookkeepers, towermen, levermen, or similar routine duties (Yardmaster) are employees and, although they may have supervision over one or more station employees, cannot be properly designated subordinate officials."

(b) Supervisory Duties, set forth:

> "Except those referred to in the next succeeding paragraph (Greater Responsibilities) *supervisory station agents* (Freight Agent), whose duties are *wholly supervisory* and *who are not required to perform routine office work* (Yardmaster), as outlined in the preceding paragraph, *are designated as subordinate officials.*"

It is therefore, considered by this petitioner that in view of the ruling of the Interstate Commerce Commission,

that there could be no manner in which the petitioner, Beeler, could be classified as an official under the Interstate Commerce Commission rulings of February 5, 1924, entered as ExParte 72, ICC Annotated, Vol 4, page 3374. The Circuit Court of Appeals has substantially held the same as the lower court which has so far departed from the proper interpretation of employee and subordinate official that this petitioner believes it is inconsistent with the ICC Act and rulings thereunder. He does believe this court should exercise the power of supervision requiring this interpretation and rule that inasmuch as Beeler, was supervising the Freight Agent's office force, and in addition to these supervisory duties, was required to perform all of the routine duties of Yardmaster, which he had performed for twenty-nine years previous, that petitioner Beeler would be defined under said Section, an employee of the defendant employer on June 17, 1946, and at the most a subordinate official; but in both cases, he would still be subject to collective bargaining agreement effective June 1, 1944. It is therefore believed by this petitioner that the Circuit Court of Appeals has gone far in its opinion, to contradict and conflict with the intents and purposes and requirements of the Railway Labor Act, as amended in 1934.

4. In this case, the petitioner insists that his individual employment contract with the defendant employer, which he was ordered to take in December, 1937, as Agent-Yardmaster was a contract as between individual and employer and not as collective bargaining contract, as Mr. Mallery states when he says the collective bargaining agreement of February 3, 1939, R. 64. As the Circuit Court of Appeals stated:

> "It, however, specifically recognizes the right of an individual employee to confer with the manage-

ment concerning matters of individual interest, and *the bargaining representative is not authorized to bind the individual employees* on *matters outside the scope of the collective interest.*" R. 118

The defendant employer on February 3, 1939, sought to bargain collectively with the representative of the union, Mr. Mielke, and certainly such negotiations with the bargaining representative was not authorized to bind the individual employee, Beeler, on matters outside the scope of collective interest. Therefore, there can be only one determination and that is, that the collective bargaining agreement of February 3, 1939, was void and of no effect, as to the individual contract of employment of the petitioner Beeler. By reason of this pretended abolishment, the seniority rights of the petitioner would be of no avail at Wichita and petitioner at that time was being carried on seniority roster at Wichita as Yardmaster with date of January, 1, 1907, Plaintiff's Exhibit 4, R. 88. A seniority right is a personal property right under due process and therefore, since the defendant employer or the representative of the union did not concede to this petitioner, the right to enter into the negotiations with them relative to his position of Yardmaster at Wichita, they took from this petitioner, without due process of law, in substance, his seniority, which is a personal property right and therefore, acted contrary to due process under the Fifth Amendment of the Constitution of the United States. The Court has stated:

"An employee's seniority rights, although arising under collective bargaining agreement between employee union and employer are individual employee's exclusive property and constitute property within the Fifth Amendment to the Constitution of

the United States." *Primakow v. Railway Express Agency,* 56 F. Supp. 413.

CONCLUSION

In conclusion, this petitioner believes that his petition for writ of certiorari should be reviewed and duly certified to the Supreme Court of the United States for determination, by reason of the fact: (a) That the collective bargaining agreement of February 3, 1939 is null and void; (b) That the collective bargaining agreement of June 1, 1944, is inconsistent with the aims, intents, purposes and requirements of the Railway Labor Act, as amended in 1934 and Interstate Commerce Commission rulings, ExParte 72; (c) That petitioner has never been an official as determined by the Act, that his duties of employment both as Agent and as Yardmaster show conclusively that petitioner is an employee and not an official, and therefore, subject to collective bargaining agreement on date of his discharge, June 17, 1946; (d) It is further shown that petitioner has made a prima facie case in accordance with the decisions of this Court, as set forth in *Hanks v. Del. & H. Ry. Co.,* 63 F. Supp. 161 and; (e) Petitioner has further shown that there has been a breach of agreement by defendant employer under Article 12 of the collective bargaining

agreement of June 1, 1944 and by reason thereof, petitioner, as employee is entitled to damages for wrongful discharge, and loss of salary of employment or in lieu thereof, the life expectancy at 65 of the petitioner at 11.10 years, and his overtime from June 1, 1944 to June 17, 1946 at the minute rate of time and one half.

Respectfully submitted,

CLAUDE E. SOWERS,
Of Wichita, Kansas,
Attorney for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1948

No. 419
No. 420

J. P. BEELER, *PETITIONER,*

VS.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, DOING BUSINESS BY AND THROUGH JOSEPH B. FLEMING AND AARON COLNON AS TRUSTEES, *RESPONDENTS.*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondents, Joseph B. Fleming and Aaron Colnon, were the duly appointed, qualified and acting trustees of the estate of The Chicago, Rock Island and Pacific Railway Company, and answered as such in two separate actions brought by J. P. Beeler in the District Court of the United States for the District of Kansas, Second Division, at Wichita. The suits in that court were numbered 3151 and 3170, and on appeal to the Circuit Court of Appeals they were numbered 3585 and 3586, and are here numbered 419 and 420 respectively. The first of the suits was brought for the recovery of overtime claimed by plaintiff, petitioner here,

and for use of his automobile in the performance of his duties as Agent-Yardmaster for his employers at Wichita covering a period from January 1, 1938 to June 14, 1946 (R. 1-11). The second action was brought by plaintiff, "for loss of salary from June 14, 1946 for a period of 11.10 years (his life expectancy) and costs of the action." (R. 97-107.) The cases were consolidated for trial and were tried before Honorable Bower Broaddus, Assigned United States District Judge, without a jury and judgments were rendered in each case in favor of the defendants. Appeals were taken to the United States Circuit Court of Appeals for the Tenth Circuit and were affirmed—169 F. 2d 557.

CORRECTIONS SUGGESTED

Before going further we wish to call attention to a serious error in the Petition for Writ of Certiorari and Brief, which appears at the bottom of page 49 thereof. Petitioner states, "The District Court found that plaintiff, Beeler, *would be allowed an expense account for use of his automobile, Para.* 9, *R.* 16, and rendered judgment, R. 17, contrary to that finding."

On July 14, 1947, at Oklahoma City, Oklahoma, the Honorable Bower Broaddus, who tried the foregoing cases at Wichita, addressed a letter to Mr. Fred J. Partridge, Deputy Clerk of the United States District Court at Wichita, in *re Beeler v. Chicago, Rock Island and Pacific Railway Company,* Nos. 3151 and 3170, in the Kansas District, enclosing Findings of Fact and Conclusions of Law, and copies of the letter and of the findings and conclusions were sent to Mr. Claude E. Sowers, Wichita, plaintiff's attorney there and here. Paragraph 9 is quoted:

> "Plaintiff knew in December, 1937, that the duties of Yardmaster would be assigned to the Agent with the title of Agent-Yardmaster, and that plaintiff would be required to perform such duties and that he would *not* be allowed an exepnse account for use of his automobile; that he would be placed on a twelve hour schedule, as evidenced by plaintiff's letter to Mr. Mielke." (Emphasis added.)

Thereafter, Mr. Sowers gave notice of appeal to the Circuit Court of Appeals, which notice was dated August 13th and filed in the District Court at Wichita August 14th, and at the same time filed "Statement of Points on which the Appellant Intends to Rely on Appeal," and in paragraph 8 thereof he stated:

> "The United States District Court erred in finding that the plaintiff knew in December, 1937, that the duties of Yardmaster would be assigned to the Agent with the title of Agent-Yardmaster, and that plaintiff would be required to perform such duties and that he would *not* be allowed an expense account for use of his automobile; that he would be placed on a twelve hour schedule, as evidenced by plaintiff's letter to Mr. Mielke." (R. 21.)

The findings were filed in the office of the Clerk of the United States Court at Wichita and became a part of the record transmitted by the clerk to the United States Circuit Court of Appeals at Denver (R. 14-17), and the record was printed in usual course. In the printing, through error of the printer, the word "not" was omitted. Counsel for petitioner was obviously aware of the correct and express declaration of the trial court that Mr. Beeler would *not* be allowed an expense account for use of his automobile. The mistake of the printer affords no justification for its use as ground for the granting of the writ of certiorari by this court.

Another error of petitioner appears at page 46 of the petition for writ. The quotation under the title "Reasons," purporting to quote from the opinion of the Circuit Court of Appeals, is not a correct quotation. The opinion of the Circuit Court of Appeals is reported in 169 Fed. 2d, p. 557, a copy of which is attached to the record. The statement of the court, second column p. 559, is this:

> "Conversely, apart from his automobile expense, he has no right of action outside the contract. (*His employment is terminable at will*), and his discharge without a hearing was not an actionable wrong. *Littell v. Evening Star Newspaper Co.*, 73 App. D. C. 409, 120 F. 2d 36; Annotation 161 A.L.R. 709; Restatement on Agency, Sec. 442; 35 Amer. Juris., p. 456-8." (Omission is within brackets and emphasized.)

The omission by petitioner of the sentence "His employment is terminable at will," changes the sense and purpose of that part of the opinion of the court.

BRIEF

Case 419—Raises Only a Question of Contractural Obligations Under Local Law. The Decision is not in Conflict With the Decision of Any Other Circuit or Any Decision of This Court. The Station Agency at Wichita Does not Come Within the Terms of Any Labor Agreement.

The relationship which existed between petitioner and respondents, and the relationship between the Switchmen's Union of North America, the Railroad Yardmasters, and the Rock Island Association of Yardmasters, is set forth clearly in the testimony of G. E. Mallory (R. 55-72). These organizations speak for their members through their representatives duly elected or appointed, pursuant to the terms of the Railway Labor Act, and all negotiations and agreements are

carried on and formulated through such representatives. *Steele v. Louisville & Nashville R. Co. et al,* 323 U. S. 192; 65 S. Ct. 226. Petitioner's relationship affecting his transfer from Caldwell to the Cline Yard at Wichita as Yardmaster at that point were all handled through the Yardmaster's representative, in accordance with the provisions and requirements of the Act.

On January 16, 1939 (R. 92) J. P. Beeler addressed W. F. Mielke, the duly elected general chairman of the Yardmasters' organization at Rock Island, Illinois, requesting that the Yardmasters' seniority list posted at the superintendent's office at El Reno, Oklahoma, be changed to show his seniority as Yardmaster at Wichita instead of Caldwell. After conference between Mr. Mielke and F. H. Frye, Supervisor of Wage Agreements for employer, it was agreed between them that the transfer might be and was made.

It was further agreed:

> "As per our agreement, the position of Agent-Yardmaster at Wichita will be considered an official position not covered by any working agreement, but should a Yardmaster's position be re-created at Wichita, Mr. Beeler would be entitled to consideration for same on basis of his seniority as a yardmaster at that point." (R. 94-95.)

Thus Mr. Beeler's request was satisfied. The position of Yardmaster has not been re-created and there was no Yardmaster's position in existence at Wichita after January 1, 1938 to the time of trial of these cases June 23-24, 1947.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact by the court and the conclusions of law are printed (R. 14-17). In Par. 3 the court found that:

"... Plaintiff's position as agent, supervising switching and performing the duties as yardmaster at that point, was recognized by the Railway and the Yardmasters' organization as an official position not within the terms of any agreement with that labor organization."

The Court in Finding of Fact No. 4 stated:

"The court further finds that the defendant was not required to maintain the position of Yardmaster at Wichita if it deemed it expedient and in its interest to place the switching operations under the supervision of the Agent; that in so doing and in the absence of any contract or agreement prohibiting or restricting such arrangement, it would incur no obligation or liability to the plaintiff."

The entire Findings of Fact by the trial court are pertinent. In paragraph 2 of the findings the court declares the fact that the plaintiff, Beeler, in 1938 assumed the duties of Agent and was known as Agent-Yardmaster; that he was paid an agreed salary during this time "and received raises in wages from time to time." And it further found that there is nothing in any contract, collective bargaining contracts, affecting the relationship until the contract of 1944, "which contract clearly shows it was not contemplated that it covered the relationship of Agent-Yardmaster." The court concluded as a matter of law:

"The court concludes and declares the law to be that under the facts here found in respect to the foregoing actions, plaintiff has not established the right to recover from the defendants and has failed to establish a claim in either action upon which recovery may be had against the defendants.

"Judgment will be for the defendants as of the date of the filing of these findings of fact and conclusions of law, this the 23rd day of June, 1947." (R. 17.)

In no event does a claim for use of an automobile or for overtime become the basis of an action at law unless there is some agreement, express or implied, therefor. In the present case there was no express or implied agreement for either overtime or use of automobile. Beeler knew when he accepted his new employment that it involved a twelve hour tour of duty if necessary to perform the work. This is evidenced by a letter which he addressed to W. F. Mielke at Rock Island, Illinois, then General Chairman for the Association of Yardmasters (R. 92-93). As a part of that letter Mr. Beeler stated:

> "I was assigned the Agent's duties in addition to the Yardmaster's duties, with the title of 'Agent-Yardmaster,' and have been handling both positions since, working twelve hours per day, applying equal time to each position."

Beeler's complaint, beginning at page 1 of the record, at page 9 states:

> "That said plaintiff herein relied on said Hours of Service Act—Adamson Act, and said written agreement between the Brotherhood and said defendants' railway at all times set forth herein."

Sections 65 and 66, 45 USCA, comprise the Adamson Act. The application of that act was construed by the Circuit Court of Appeals for the Seventh Circuit in *Plummer v. Penn. R. Co.*, 37 F. 2d 874. This decision seems to settle the claim for overtime and for use of automobile against the claim of petitioner. In this case the court at page 875 declared:

> "In its decision sustaining the constitutionality of the Adamson Law, the Supreme Court held that the first section permanently established an eight-hour day in the specified employments, but that it did not undertake

to limit the hours of service or to fix wages therefor. *Wilson v. New*, 243 U. S. 332, 37 S. Ct. 298, 61 L. Ed. 755, L. R. A. 1917 E., 938, Ann. Cas. 1918A, 1024. Section 2 of the act did undertake the regulation of wages in those employments for a limited period, which expired long before appellant's employment began.

"It thus remained within the right of employers and employes to agree between themselves upon the hours to be served, and the wages to be paid therefor. The authorities supporting this proposition, under statutes similar in principle, are too definite and numerous to admit of controversy thereon." (Citing cases.)

Petitioner's complaint states that he served four hours daily as overtime for a long period, beginning January 1, 1938, and continuing to June, 1946, and that he used his automobile in the performance of his duties. The decision of the Circuit Court of Appeals in the Plummer case, page 875, second column, we believe disposes adversely his claim for overtime and use of his automobile. The Court said:

"The fundamental requisite of a contract is a meeting of minds of the parties to be bound by it. The evidence of such meeting of minds may be afforded by writings, by words spoken, or by a course of conduct. The acts of the parties may be such as to establish, quite as conclusively as the most formal and solemn instrument of writing, that there was such a meeting of minds between the parties.

"If these parties had agreed in writing that the service should be twelve hours daily, and the pay therefor $180 a month, or should be at the rate of $120 a month for an eight-hour day, and $180 a month for a twelve-hour day, it could not more definitely appear that such was the contract, than does appear from the fact that appellant, for more than six years, worked twelve hours daily for this employer and received therefor $180 for each month worked. From this long uniform practice there is no room for any other conclusion than that

the minds of the parties met on an undertaking by appellant to serve twelve hours daily, and appellee to pay in full for such twelve hours of daily service $180 each month.

"In each of the cases last above cited there was present the element of long-continued service, at a specified wage, for longer hours than the statutory time fixed for a day's service; and in each of them the court declared there could be no recovery for the overtime. The District Court properly sustained the demurrer to the declaration, and its judgment is affirmed."

In Sheets v. Eales, 135 Kan. 627, 11 Pac. 2d 1020, which action was brought for additional compensation beyond that stated in a written contract of employment, the court said in concluding its opinion: (Page 631)

"In 25 A. L. R. 218 there is an extended note treating of a servant's right to compensation for extra work or overtime, and a rule was stated based on a vast number of authorities, as follows:

'It is generally held that there is a presumption of law that all services rendered by an employee during the period for which he is employed, of a nature similar to those required of him in the course of his regular duties, are paid for by his salary, and to overcome this presumption he must show an express agreement for extra compensation.'

"See also *Houghton v. Kittleman,* 7 Kan. App. 207; *Robinette v. Coal Mining Co.,* 88 W. Va. 514.

"In our view the evidence of plaintiff failed to establish a right of recovery and the judgment sustaining the demurrer to his evidence is affirmed."

Another Kansas case is that of *Hurt v. Edgell, etc.,* 147 Kan. 234, 75 Pac. 2d 834. In its opinion the court referred to *Sheets v. Eales, supra.* After reviewing the facts at length, which included a claim of plaintiff Hurt for overtime and

extra pay which he claimed were for services outside the terms of the written contract, the court referred to the judgment of the trial court as follows: (Page 237)

> "In holding that the plaintiff was not entitled to recover, the court cited *Guthrie v. Merrill,* 4 Kan. 187, and *Weaver v. Skinner,* 103 Kan. 97, 172 Pac. 1024. In the former case the syllabus reads:
>
> > 'Where plaintiff agreed to work for a stipulated price per month, the contract being silent as to extra services, * * * in the absence of other proof, all extra work done on Sundays will be deemed to have been performed under the contract.'
>
> "In *Kelsey v. Puckett,* 198 Ia. 839, 200 N. W. 421, it was stated that 'There is a presumption in law that all services rendered by an employee during the period for which he is employed, of a nature similar to those required in the course of his regular duties, are compensated under the stipulated agreement.' (P. 842.)
>
> "In *Brooks v. L. N. R. Co.,* 218 Ky. 279, 291 S. W. 371, it was held that when the plaintiff was employed as a laborer and for a period of three years had received, without objection, wages as a laborer, he could not recover the difference between the wages of the laborer and those of an outside hostler's helper because on certain occasions he had assisted in such outside work.
>
> "In *Thibault v. National Tea Co.,* 198 Minn. 246, 269 N. W. 466, 107 A. L. R. 702, it was said:
>
> > 'In this instance plaintiff was employed in a certain capacity, not by the hour or by the day, but by the week, on a weekly salary or wage. He was paid the sum agreed upon at the end of each week and receipted in full for a week's work. It is not reasonable to construe this statute so as to give a workman a cause of action for overtime when his agreed compensation for the full period has been

> received. Every moment of his work was spent under the single contract of employment for a stipulated price for the whole week. Under similar facts, recovery for overtime by virtue of statutes fixing the duration of a standard working day has been denied.'" (Here among other cases the court cited *United States v. Martin*, 94 U. S. 400, and *Plummer v. Pennsylvania R. Co.*, 37 Fed. 2d 874 (p. 248).)

When appellant left the conference with C. J. Brown, General Manager of the Railway, on December 24, 1937 (R. 6 Par. 9), he knew there would be no assistant in the yard and that there would be no pay for overtime or for the use of his automobile. His pay as Agent-Yardmaster was increased at various times, beginning January 1, 1938, until his dismissal June 17, 1946.

United States v. Martin, 94 U. S. 400, arose under an act of Congress (15 Stat. 77), declaring that eight hours shall constitute a day's work for certain employees of the government. Martin claimed that under the act of Congress eight hours constituted a day's work for all laborers employed under what was designated as the "Eight Hour Law." Martin was required to work twelve hours a day and he made claim for overtime of four hours daily. The court below dismissed the petition but subsequently made an order vacating the judgment and directing:

> "For the purpose of an appeal, a *pro forma* judgment to be entered in favor of the claimant in the sum of $1019.40. The United States thereupon appealed."

The Supreme Court determined the case on appeal and entered this order:

> "Judgment reversed, and cause remanded with directions to dismiss the petition."

In the course of the opinion the court said:

> "In the case before us, the claimant continued his work, after understanding that eight hours would not be accepted as a day's labor, but that he must work twelve hours, as he had done before. He received his pay of $2.50 a day for the work of twelve hours a day, as a calendar day's work during the period in question, without protest or objection. At that time ordinary laborers under the same government received but $1.75 per day at the same place, and those engaged in the same department with the claimant in a private establishment, at the same place, received but $2 for a day's work of twelve hours, and the finding adds, 'they had more work to do than the claimant had while similarly employed.' The claimant's contract was a voluntary and a reasonable one, by which he must now be bound."

Attention is directed to *Coke v. Illinois Central R. Co.*, 255 Fed. 190. There the court held that the Adamson Law does not apply to all employees of railroads engaged in interstate commerce but applies only to the four brotherhoods which were on the verge of a nationwide strike. The court said:

> "The Supreme Court sustained the classification on the ground that only those actually engaged in the operation of trains (not including switchmen) were threatening to strike, and that it was, therefore, proper to pass legislation which affected only those who were so threatening; apparently meaning thereby to say that the legislation applied only to the Order of Railway Conductors, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Engineers, and Brotherhood of Railway Trainmen."

Then quoting from the decision of the Supreme Court in *Wilson v. New*, 243 U. S. 332, the Federal Court continued:

> "Clearly the Adamson Law does not apply to all em-

ployees of railroads engaged in interstate commerce, nor does it apply to all those who are actually engaged in doing some of the things necessary for the operation of trains."

Petitioner's complaint below and the evidence introduced at the trial refer to and recognize an agreement between the Railway Company and the Rock Island Yardmasters' Association dated July 30, 1935 (R. 74) and the agreement between the Railway Company and the Railroad Yardmasters of America, Rock Island Division No. 26, dated January 1, 1938 (R. 81), and agreement between the Trustees of the Railway Company and Railroad Yardmasters of America, dated May 20, 1944 (R. 76), all introduced by petitioner in support of his complaints. He now seeks to repudiate these agreements, entirely disregarding (c) of *Ex Parte* No. 72 (Sub. No. 1), 264 ICC 239-246, copied as a footnote to the opinion of the court below, 169 F. 2d 557 at p. 561. For convenience the ICC designation above referred to is reproduced:

"(c) GREATER RESPONSIBILITIES. Supervisory station agents at large and important stations whose duties are wholly supervisory, and who are of necessity vested with greater responsibilities, duties and authority than agents hereinbefore classed as subordinate officials, may be designated officials and excluded from the class of subordinate officials."

After January 1, 1938, Mr. Beeler's duties were wholly supervisory. He had an office force to look after the details of the freight office (R. 41) and an engine crew, one of whose number was a foreman, handled the work in the switch yard, so that Mr. Beeler's duties were wholly supervisory. The Circuit Court stated in its opinion (R. 121):

"Here, for eight years, appellant performed the duties of a station agent at a large and important station. He

occupied the office of the station agent, and supervised all the business of the company at the Wichita terminal, * * * ."

The Wichita agency was and has been recognized as an important one and the yard switching is incidental to the many duties of the agent at this and other large and important points. Mr. Beeler testified (R. 44):

"Q. You drew your pay as Agent-Yardmaster?
A. Yes, sir.
Q. For many years, from 1938 until June 1946?
A. Yes, sir.
Q. You knew all of the time that was the title and that you were being paid for that service?
A. Yes, sir."

Mr. Beeler was under no illusion as to the correct nature of his employment and that the compensation he drew from his employer was that of Agent-Yardmaster and not as Yardmaster. When he accepted and filled the position, it has been shown that he was aware of the fact that his employer would not grant additional pay for use of his automobile or for overtime.

Respondents believe the decision of the lower court is not in conflict with the decision of any other circuit court or of this court; nor has it departed or sanctioned a departure from the accepted and usual course of judicial proceedings, nor does it call for an exercise of this court's power of supervision.

Case 420—The Decision of the Circuit Court in This Case, as in Case 419, is not in Conflict With the Decision of Any Other Circuit Court of Appeals or of This Court; Nor Has it Departed or Sanctioned a Departure From the Accepted And Usual Course of Judicial Proceedings; Nor Does it Call for an Exercise of This Court's Power of Supervision. The Railway Company Incurred no Obligation to Petitioner by Discontinuing the Yardmaster Position.

At pages 4 and 5 of the Petition a "Summary of the Matters Involved" is set forth, and at page 6 the reasons assigned for review by this court are stated. The Yardmaster labor agreements with the Railway Company are set out in the record. That of the year 1935 is shown at page 74; the 1938 agreement at page 81; the 1944 agreement at page 76 Respondents believe and have insisted at all times that after January 1, 1938, petitioner's relationship with the respondents was not subject to any of those or other labor agreements. This for the reason that he was not an employee within the designation of the Railway Labor Act, 45 USCA, Section 151 Fifth, defining the term "employee" as "one who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission * * *." *He was an official.* (*Ex Parte* No. 72 (b) and (c)) *infra,* pp. 21-22. The comprehensive order of the Commission which was referred to by the Circuit Court of Appeals in its opinion, begins at page 115 of the record. The quoted part of *Ex Parte* No. 72 appears as a footnote to the opinion at page 121 of the record.

The purposes of the Railway Labor Act, Chap. 8, Sec. 151 (a), 45 USCA, were the avoidance of interruption to commerce or to the operation of any carrier engaged therein; to forbid any limitation from freedom of association among employees or interference with the right of employees to join a labor organization; the complete independence of carriers and employees in the matter of self-organization to carry out the purposes of the Act; to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, and working conditions; and for the orderly settlement of disputes or grievances growing out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

The various agreements entered into between this employer and its employees observed the provision of the Act, and all negotiations between the parties were conducted through the recognized representatives of the parties. Section 152, Second of the Act provides:

> "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

The Act contains other provisions with which we are not concerned, but the matter of notices given each to the other by their representatives was likewise followed in all respects.

Wichita is an important city on respondents' railroad, but it is not a division point where trains are made up or broken up in the yards. The terminal points, north and south respectively, of Wichita are Herington and Caldwell. It is necessary to have an understanding of Mr. Beeler's duties generally after January 1, 1938, when he became Agent-Yardmaster, particularly as to the length of time given to his work. Mr. Beeler stated (R. 92-93), "January 1, 1938 I was assigned the Agent's duties in addition to the Yardmaster's duties, with the title of 'Agent-Yardmaster', and have been handling both positions since, working twelve hours per day, *applying equal time of each position.*" (Italics ours.) (R. 26) Mr. Beeler stated in respect to the time he spent as Agent, "I don't think the Agent's duties altogether would amount to more than an hour a day." Again, (R. 40-41-42):

> "Q. How much time each day on the job did you spend around the station; around the freight house?
>
> A. I spent the majority of my time except when I was on the road from one place to another.

Q. Around the freight office?
A. Yes, in my office.
Q. And you had an office adjacent to the larger place or office in which the Clerks were working?
A. Yes, sir.
Q. You had general supervision over the entire business; freight business of the Rock Island Railway at Wichita, did you not?
A. Yes, sir.
Q. You were charged with the responsibilities of that office?
A. That's right.
Q. In the freight yard, generally you had one engine at work, did you not?
A. Yes, sir.
Q. Of how many men does an engine crew consist?
A. Five.
Q. An Engineer, Fireman, Engine Foreman, and two Switchmen?
A. Yes, sir."

From the foregoing we find petitioner reporting to his union representative that he divides his time equally between the yard and the freight office. Next he says his freight office duties required about one hour a day. Then next he testified that he spent the majority of his time around the freight office, the exception being when he was on the road, going from one place to another. These inconsistencies of petitioner seem very well to confirm the wisdom of making a change in the person of supervising officer.

Petitioner also testified (R. 33-34) that Mr. McGraw succeeded him as Agent-Yardmaster, and that the job was not bulletined under collective bargaining; that McGraw had no seniority as Yardmaster and that he was employed as Agent-Yardmaster. This fact is most significant. If the Yardmasters' Organization had deemed the position of Agent-Yardmaster anything less than an official position, the organiza-

tion would have protested against Mr. McGraw assuming the agency by appointment. This was not done for the patent reason that there was an agreement in effect negotiated between the employer and the employee's representative that the position of Agent-Yardmaster should be an official position not governed by any labor agreement. Plaintiff's (Petitioner) Exhibit 3 (R. 81) of January 1, 1938, Article 1, under the title "Scope," recites:

> "This agreement shall apply to positions of Yardmasters at points where such positions are established by the management and so long as such positions are maintained, the *management retaining the right to establish and abolish such positions at any point.* This agreement will not apply to positions of General Yardmasters or Footboard Yardmasters." (Emphasis added.)

Article 3 (b) (R. 82) of the same agreement provided that Yardmasters promoted to official positions or granted leave of absence in connection with committee work, "* * * will retain and accumulate seniority under this agreement."

The last named provision is carried into the agreement of May 20, 1944. That agreement also contains this paragraph under Article 1 (R. 77):

> "The practice of station agents supervising switching service at various points will not be changed or considered as affected by this agreement, but the practice will not be extended to points where yardmasters are now assigned for the purpose of displacing yardmasters."

This is a clear recognition of the regularity and propriety of *station agents* supervising switching service. Wichita was one of those points. The Yardmaster's job at Wichita was officially abolished February 3, 1939 (R. 63). Also (R. 94) in correspondence between F. H. Frye and W. F. Mielke, employer and employee representatives, (February 3, 1939) it was agreed:

"The position of Agent-Yardmaster at Wichita will be considered an official position, not covered by any working agreement."

Progressive Steps have been taken by Congress in respect to railroad labor relations. One of the earliest was Transportation Act, 1920, 41 Stat. L. 456.

Title III, Section 300, of the Act relates to "disputes between carriers and their employees and subordinate officials." Much of the original Act has been amended or repealed. The Act is an amendment of the Interstate Commerce Act approved February 4, 1887. The Interstate Commerce Commission is referred to in the labor section of the Act, 1920, as "Commission." The term "carrier" includes "any carrier by railroad, subject to the Interstate Commerce Act." Paragraph 5 of Section 300 of the Act provides:

> "The term 'subordinate official' includes officials of carriers of such class or rank as the Commission shall designate by regulation formulated and issued after such notice and hearing as the Commission may prescribe, to the carriers, and employees and subordinate officials of carriers, and organizations thereof, directly to be affected by such regulations."

Under the general powers conferred upon the Commission by the Transportation Act, 1920, the Commission entered an order in "*Ex Parte* No. 72," in which it first quotes Paragraph 5 of Section 300 of the Transportation Act as above. In that order dated November 24, 1920, after defining certain classes of employees, not including station agents, the Commission concluded the order with this declaration:

> "The above definitions include all of the classes of employees whose claims to recognition as 'subordinate officials' were presented at the hearings, except supervisory station agents. The supervisory station agents

are those who have supervision of the work of other station employees. They cover the range from the station where one employee other than the agent is employed to the agents at the largest and most important points. They are the official and responsible representatives of the company in its relationships with the public and frequently in a legal sense. Their compensation naturally varies with the responsibilities of their positions. It is not believed that this class can be consistently included within the term 'subordinate official' as that term is used in Title III of the Transportation Act, 1920.

"The list of subordinate officials above prescribed may be enlarged or restricted after due notice and hearing, if and when occasion warrants."

At a session of the Interstate Commerce Commission on February 5, 1924, *Ex Parte* No. 72 was again under discussion and it was ordered by the Commission that the term "subordinate official" appearing in Paragraph 5 of Section 300 of the 1920 Act as quoted above, should be modified and the Commission accordingly amplified the term "Supervisory Station Agents" through the adoption of the following definition and designation:

"*SUPERVISORY STATION AGENTS.* The duties and responsibilities of supervisory station agents vary so widely that they cannot all be consistently designated subordinate officials. This class will be subdivided, therefore, as follows:

"(a) ROUTINE DUTIES. Supervisory station agents who, in addition to their supervisory duties, are required to perform work usually performed by telegraphers, telephone operators, ticket sellers, bookkeepers, towermen, levermen, or similar routine duties are employees and, although they may have supervision over one or more other station employees, cannot be properly designated subordinate officials.

"(b) SUPERVISORY DUTIES. Except those referred to in the next succeeding paragraph, supervisory station agents whose duties are wholly supervisory and who are not required to perform routine office work, as outlined in the preceding paragraph, are designated as subordinate officials.

"(c) GREATER RESPONSIBILITIES. Supervisory station agents at large and important stations whose duties are wholly supervisory, and who are of necessity vested with greater responsibilities, duties and authority than agents hereinbefore classed as subordinate officials, may be designated officials and excluded from the class of subordinate officials."

The Commission has consistently followed this designation whenever it has had occasion to consider the relationship of Supervisory Station Agents. *Ex Parte* No. 72 (Sub.-No. 1), 264 ICC 239-246.

The Railroad Labor Act of 1926, and as amended in 1934, 1936, and 1940, 45 USCA, Section 151 "First," defines the term "carrier" as including express companies, sleeping car companies, carrier by railroad, etc. Paragraph Fifth defines the term "employee" as used herein and "includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendering of his service) *who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by order hereafter entered by the Commission* pursuant to the authority which is expressly conferred upon it to enter orders amending or interpreting such existing orders." Paragraph Sixth states, "The term 'representative' means any person or persons, labor union, organization, or corporation designated either by the carrier or group of carriers, or by its or their employees, to act for it or them." (Emphasis ours.)

Under the ICC classification of (b) and (c), the status of the Wichita agent *was that of an official.* This is shown by the testimony of G. E. Mallery, Manager Personnel for the Railway Company with office in Chicago, who testified as a witness in these cases as follows:

(R. pp. 55-58.) His entire testimony is important to a more complete understanding of the cases.

Respecting the official capacity of Agent-Yardmaster, the Court inquired of Mr. Mallery:

> The Court: The agreement made with Mr. Mielke was that agreement in writing? (R. 58.)
>
> The Witness: Yes, sir.
>
> The Court: Where is it?
>
> The Witness: It was introduced this morning as defendants Exhibit B. (R. 58.)
>
> The Court: I want to read it right now. This says: "As per our agreement the position of agent-yardmaster at Wichita will be considered an official position, not covered by any working agreement, but should a yardmaster position be re-created at Wichita Mr. Beeler would be entitled to consideration for same on basis of his seniority as a yardmaster at that point." This also says: "Under the circumstances we are agreeable to carrying Mr. Beeler on the Wichita yardmasters' seniority list as a yardmaster, but it is very likely that the switchmen's union will contend that he will thereby lose his rights as a switchman at Caldwell. However, that feature can be met when and if the point is raised." All right.
>
> The Witness: Under that agreement, Mr. Beeler's position was Agent-Yardmaster and was not subject to any labor agreement, and as any other official position the Carrier has always maintained the prerogative to appoint them to a position and take them off of a position as they saw fit. (58)

Witness Mallery also stated that under new agreement effective March 15, 1947, it was recognized that the term "Agent-Yardmaster" was a misnomer and is continued in the new agreement, but Agents will have charge of switching yard service under the title of Agent. If in the future a Yardmaster's position would be bulletined, then the person holding seniority would become Yardmaster.

Exhibit B as read by the court and taken in the record was a letter written to Mr. W. F. Mielke. Appellant testified (R. 40) that Mr. Mielke was President or General Chairman of the Yardmasters, and Mr. Mallery (R. 69) testified that Mr. Mielke was succeeded as General Chairman of the Yardmasters by Mr. Cowick, who was General Chairman when Mr. Beeler was dismissed as Agent in June, 1946. Testifying further with reference to the relationship of Agent-Yardmaster, Mr. Mallery (Tr. 70) said:

> "*Ex Parte* No. 72 in February, 1921, following the Transportation Act of 1920, described the meaning of the term employee and subordinate officials. The Interstate Commerce Commission held hearings under *Ex Parte* No. 72 setting forth different classifications of agent. The regular agents were covered by contract. The agents at important stations, where they still were not in charge of large, important stations, where they had certain detailed work to do, they were (162) subordinate officials, and they are entitled to representation. At the larger and more important stations, they were designated and classed as supervisory officers not subject to the provisions of any contract.
>
> Q. The supervisory officers referred to in the 1944 agreement, on your theory, fall in that class of officers.
>
> A. Yes, sir; anbody not designated in *Ex Parte* 72 as an employee or subordinate official, automatically fell into the classification of an official. In other words, the Interstate Commerce Commission didn't designate who was an officer but did say who were employees and subordinate offiicals."

It was the custom and practice for the railway on one hand and the labor organizations on the other to negotiate through designated and authorized representatives. Mr. Mallery was the representative of the Railway Company. Mr. Mielke and following him Mr. Cowick were the duly-elected and authorized representatives of the Yardmasters Association of America. It was the purpose and design of all federal labor legislation that labor should speak and act through a duly-appointed or elected representative and that the carriers should likewise speak through authorized representatives.

Petitioner recognized the propriety of dealing through the representative of the Yardmasters Organization in his letter of January 16, 1939, to Mr. W. F. Mielke, its president, at Rock Island, Illinois (Exhibit A, R. 92-93-94). The subject of his letter was a complaint that his Yardmaster seniority was carried on the roster as at Caldwell instead of Wichita. Mr. Mielke, representing the Yardmasters Organization, and Mr. F. H. Frye, representing the Railway Company, conferred on January 27th, when Mr. Beeler's letter of January 16th was evidently handed to Mr. Frye, as he (Mr. Frye) wrote Mr. Mielke, February 3, 1939, returning the Beeler letter (Exhibit B, Tr. 94-95) and confirmed an agreement reached between them that Mr. Beeler be carried on the Wichita yardmaster seniority roster, and both parties recognized the Agent-Yardmaster position at Wichita to be an official position not covered by any labor contract. The letter follows:

"Mr. W. F. Mielke,
510, 39th Street,
Rock Island, Ill.
Dear Sir:

In connection with our conference on January 27, and returning Mr. Beeler's letter of Jan. 16, file 385-A.

Under the circumstances we are agreeable to carrying Mr. Beeler on the Wichita yardmasters' seniority (191) list as a yardmaster, but it is very likely that the switchmen's union will contend that he will thereby lose his rights as a switchman at Caldwell. However, that feature can be met when and if the point is raised.

As per our agreement the position of agent-yardmaster at Wichita will be considered an official position, not covered by any working agreement, but should a yardmaster position be re-created at Wichita Mr. Beeler would be entitled to consideration for same on basis of his seniority as a yardmaster at that point.

Yours truly,
F. H. FRYE

P.S. Please send carbon of this letter, approved, and return for our file.

Accepted: W. F. MIELKE."

After the dismissal of appellant as Agent-Yardmaster on June 17, 1946, Mr. Beeler wrote Mr. W. H. Hillis (Exhibit G, Tr. 106) concerning his situation and Mr. Hillis, Chief Operating Officer under the Trustees, advised him:

"The Agency at Wichita is a supervisory one, not subject to the provisions of any labor agreement.

"I am advised by our operating people in the field that they did not feel you were giving your organization the proper supervision and they therefore felt (262) warranted in removing from the position. You were not dismissed from service and you were told you could exercise such seniority rights as you may hold under any labor agreement.

"My investigation does not develop any reason for reversing the decision of our people in the field."

Petitioner's brief copies extensively from *Elgin Joliet & Eastern Ry. Co. v. Burley*, 327 U. S. 661, 66 S. Ct. 721, which involved the question of the final effect of the Railway Adjustment Board under the Railway Labor Act. A

controversy arose on the operation of the Railway Company's Whiting yard, where some of the switching crews had been employed by the Standard Oil Company to do private intra-plant switching. The intra-brotherhood clash then ensued. We believe there is no point of similarity in fact or principle as compared with Mr. Beeler's status.

Mr. Beeler as Agent, with his duties in his office at the station where he spent the majority of his time, as he testified (R. 41) included such supervision of the yard as it required. The yard engine, as abundantly shown by the evidence, capably handled the yard work receiving usual aid from train crew conductors, yard clerks, telegraph operators, etc.

Under the classification of sub (c) as above quoted from the order of the Commission in *Ex Parte* 72, dated February 5, 1924, Mr. Beeler was the Station Agent at a large and important station and his duties were wholly supervisory and were vested with greater responsibilities. He, therefore, as such Agent was designated as an official. His Yardmaster's organization (R. 94, Exhibit B) specifically recognized his agency as an official position, not covered by any working agreement. The exhibit further provided that if the position of Yardmaster should be recreated, Mr. Beeler would be entitled to consideration on basis of his seniority as a Yardmaster at that point.

The plain fact is the Yardmaster job was officially abolished February 3, 1939, by the agreement (Exhibit B) and it was so recognized by appellant and appellees at all subseqeunt times. (Petitioner and Respondents here.)

The second decision of the court, *E. J. & E. Ry. v. Burley, supra,* states in the first syllabus:

> "The extent of authority of collective agent to represent employee before Railroad Adjustment Board does not turn on technical agency rules, but may be affected

by custom and practice in the railroad world. Railway Labor Act, Sec. 3, subd. 1 (i), 45 U. S. C. A. Sec. 153, subd. 1 (i)."

Certainly the railroad world in its relationship with its employees deals with employee representatives.

Certain agreements between labor unions and the appellees are mentioned, and portions are copied, but none relate directly or by implication to the employment or discharge of an individual employee, or grant to such employee or guarantee to any employee continued employment, or deprive the employer of the right to dismiss or discharge at the will of the employer.

Courts recognize the right of a railway company to handle and manage its own affairs and to engage and discharge persons in and from its employ without creating obligations therefor, unless some express contract of hire exists.

In *Edwards v. Kentucky Utilities Co.*, 286 Ky. 341, 150 S. W. (2d) 916, the court, discussing the question of employment contracts, said:

> "A universally recognized rule of law is that a contract for permanent employment which is not supported by any consideration other than the obligation of services to be performed on the one hand and wages to be paid on the other is a contract for an indefinite period, and, as such, is terminable at the will of either party. R. C. L., Vol. 18, pp. 509, 510; Corpus Juris, Vol. 39, p. 72; *Clay v. Louisville & Nashville R. R. Co.*, 254 Ky. 271, 71 S. W. 2d 617; *Louisville & Nashville R. R. Co. v. Offutt*, 99 Ky. 427, 36 S. W. 181, 18 Ky. Law Rep. 303, 59 Am. St. Rep. 467; *Perry v. Wheeler*, 12 Bush 541." (P. 918.)

In that case Edwards brought suit for breach of contract for permanent and continuous employment. The trial court dismissed the petition and on appeal to the court of appeals

the court affirmed the decision and declared in its opinion the principle so very clearly stated. That rule is so firmly grounded and established by the courts almost universally that it is written in the text of the law of "Master and Servant," 35 Am. Jur., 456. Quoting from p. 457, it is said:

> "According to the general rule as laid down by a majority of the courts, however, contracts of employment which mention no period of duration, which are in a true sense indefinite and without stipulation for an implied minimum period, are deemed terminable at will of either party; and the burden of proving the contrary must be assumed by the party who asserts that the employee is engaged for a definite period." (PP. 457-458.)

Railroad employment, so far as the individual is concerned, does not differ from employment of any other branch of industry. The United States Supreme Court, applying the terms of the Railway Labor Act to a situation presented by a dispute between the railway company and a labor organization, and the right of the railway to employ and discharge its employees, said in *Virginian Railway Co. v. System Federation No.* 40, 300 U. S. 515, 57 S. Ct. 592:

> "The provisions of the Railway Labor Act invoked here neither compel the employer to enter into any agreement, nor preclude it from entering into any contract with individual employees. They do not 'interfere with the normal exercise of the right of the carrier to select its employees or to discharge them.' See the Railway Clerks Case, *supra*, 281 U. S. 548, 571, 50 S. Ct. 427, 434, 74 L. Ed. 1034." (P. 605.)

Also, the Supreme Court said in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615, p. 628:

> "The act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them."

The same principle is stated in *Louisville & Nashville R. Co. v. Bryant, et al, etc.*, 263 Ky. 578, 92 S. W. (2d) 749. At p. 752 of the reporter it is stated:

> "It is a familiar rule, where a contract of hiring does not bind the employee to serve the employer for a definite fixed period, the employer may terminate the contract at any time, though he agreed to give the employee work as long as he did honest and faithful work. *Louisville & N. R. Co. v. Offutt*, 99 Ky. 427, 36 S. W. 181, 18 Ky. Law Rep. 303, 59 Am. St. Rep. 467. So is a contract for a stated position or 'as long as he performs his duties in a successful or satisfactory manner.' *Bridgeford & Co. v. Meagher*, 144 Ky. 479, 139 S. W. 750. A contract of hiring not for a definite term or period, but as long as the employee desires the position, is terminable at will of either employee or employer." (P. 752.) Cases cited.

Petitioner did not declare upon any contract of employment as such but has pleaded schedules or agreements between The Chicago, Rock Island and Pacific Railway Company with the Railroad Yardmasters of America, which is not a contract of employment in any sense but is a schedule of hours of service, working conditions, and rates of pay. He could have at any time quit the service of the employer without incurring any financial obligation whatsoever.

Further, on the nature of labor contracts, we refer to *Littell v. Evening Star Newspaper Co.*, 120 Fed. (2d) 36. Mary C. Littell brought suit against the newspaper company doing business as the Evening Star for breach of employment contract. Judgment was entered on a directed verdict for defendant and plaintiff appealed and the judg-

ment was affirmed. The fifth syllabus of the opinion very well states the substance of the opinion, and this is quoted:

> "Where the intent to enter into a contract for permanent employment, not terminable except pursuant to its express terms, is not clearly expressed, and there is no evidence showing other consideration than a promise to render services, the assumption will be that, even though the parties speak in terms of permanent employment, the parties have in mind merely the ordinary business contract for a continuing employment, terminable at the will of either party."

Alabama Mills, Inc. v. Smith (*Ala.*), 186 So. 699, is an action for breach of contract of employment. There was judgment for plaintiff, which was reversed and remanded on appeal. The first question discussed was whether plaintiff had such a contract as to justify the claim for permanent employment or employment for a definite period. At page 702 the court stated:

> "Undoubtedly a contract of employment which is in a true sense indefinite and without stipulation for an implied minimum period, is at the will of either party. 18 R. C. L. 508, section 19, and page 509, section 20; *Howard v. East Tennessee, V. & G. R. Co.*, 91 Ala. 268, 8 So. 868; *Arentz v. Morse Dry Dock & Repair Co.*, 249 N. Y. 439, 164 N. E. 342, 62 A. L. R. 231." (P. 702.)

Yazoo and Mississippi Valley R. Co. v. Webb, C.C.A. (5th Cir.), 64 Fed. (2d) 902. There was judgment for plaintiff, and on appeal to the Circuit Court it was reversed with directions to dismiss the bill. The court commented favorably upon agreements covering wages and working conditions between the managers of an industry and its employees, and said further:

> "When the agreement is published by the managers, it becomes until abrogated the rule of that industry

> and any individual who thereafter continues in its employment or takes new employment takes it on the terms thereby fixed. Ordinarily, as in this case, there is no period fixed for the hirings and they are at the will of the parties, the employer having the right to discharge at any time and the employee having the right to quit." (PP. 903-904.)

T. & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks, 281 U. S. 548; 50 S. Ct. 427 and 434 (571) Official Ed., "The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them." The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing.

Boatright v. Steinite Radio Corp. et al, 46 Fed. (2d) 385 (10th Cir.), involved a contract of employment which provided for the payment of fixed sums without providing for time which service shall continue, held to be terminable at will. At page 389 (2nd column), it is stated:

> "An agreement of employment, indefinite as to time, is terminable at the will of either party, and therefore creates no executory obligation." (Citing numerous cases.)

Also, at page 390, first column, the court stated:

> "A contract of employment, which provides that the employee shall receive a fixed sum for each day, week, month or year of service but makes no provision as to the time such services shall continue is an indefinite hiring and is terminable at the will of either party."

Kunz v. Colnon, et al, 54 Fed. Supp. 673, and two companion cases, opinion by Judge Helvering, March 31, 1944, follows the principle declared in the foregoing cases and

quoted from Swart v. Huston, 154 Kan. 182; 117 Pac. (2d) 576:

> "But a collective bargain between an employer of labor and a labor union does not ordinarily constitute a contract of employment between the employer and any individual member of that union. He and his employer make their own contract impliedly at least if not expressly. The collective bargain between employer and union outlines the general conditions under which the business shall be conducted in respect to wages, hours of labor, working conditions, and matters incidental there. Ordinarily the collective bargain does not of itself make a contract of employment between A as employer and B as workman which either can enforce, or which will furnish the basis for an action for damages if it is breached. This is settled text-book doctrine."

The court concluded as a matter of law that the plaintiffs failed to establish a right to recover and rendered judgment for the defendants against the plaintiffs for costs.

The Law Does not Require the Maintenance or Re-Establishment of a Yardmaster for the Sole Benefit of Petitioner.

We believe the foregoing principle is well established. In *Great Northern Ry. Co. v. State of Minnesota, ex rel.*, 238 U. S. 340, 35 S. Ct. 753, the court said:

> "A railroad's possessions are subject to its public duty; but beyond this and within charter limitation, like other owners of private property it may control its own affairs." (P. 755.)

In *Brooks-Scanlon Co. v. Railroad Commission of Louisana*, 251 U. S. 396, 40 S. Ct. 183, it is said:

> "A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage." (P. 184.) (Citing cases.)

The case of *Yazoo & Mississippi Valley R. Co. v. Mitchell,* 173 Miss. 594, 161 Sou. 860, was decided by the Supreme Court of Mississippi. Because of changed operating conditions due to the construction of a bridge across the Mississippi River at Vicksburg and to effect great economies in operation, the switching yards of that railroad with the Alabama & Vicksburg Ry. Co. were consolidated, resulting in the revision of the seniority lists and the displacement and loss of employment by Mitchell, who claimed his seniority rights had not been observed. He brought suit against his employer and obtained judgment in a Circuit Court. On appeal the Supreme Court reversed the judgment and in the course of its opinion said: (P. 863)

> "The railroad had a right to merge its two yards in the interest of economy. The railroad, in fact, had a right to abolish any switching yard. There was no effort in either of the contracts to prevent merger, consolidation, or abolishment of any such yard."

Crowley v. Delaware & Hudson R. Corp., 63 Fed. Supp. 164. Plaintiff was a Train Dispatcher. The railroad made some rearrangement in the dispatching of its trains, whereby the position of Night Chief was abolished, and in accordance with an arrangement respecting seniority rights the plaintiff bid in the first Trick Dispatcher tour of duty. The change from Chief Dispatcher to Trick Dispatcher brought about a reduction in his pay. An award was made in his favor by the National Railroad Adjustment Board and the suit was brought by plaintiff to enforce the award. The court denied recovery and said: (P. 166)

> "There is no obligation on the defendant to create or re-establish any particular position. Plaintiff's legal rights are invaded only when he fails to receive the payroll classification to which he is entitled by reason of duties performed. The contention that the duties of

night chief dispatcher still exist at Carbondale and are being performed by employees other than the plaintiff is not available here. To sustain such a contention would require that there be read into the agreement a provision to the effect that whenever the duties of a position exist then a corresponding payroll classification must be designated. The agreement contains no such provision."

The court further held that necessity for the position of Night Chief Dispatcher was not at issue, although the Adjustment Board seems to have reached its conclusion upon that assumption.

Another Train Dispatcher case is that of *Hanks v. Delaware & Hudson R. Corp.*, 63 Fed. Supp. 161. The Hanks case was decided by Judge Brennan, as was the case of *Crowley v. Delaware & H. R. Corp.*, just above mentioned. The controversy between Hanks and the Railroad was submitted to the National Railroad Adjustment Board, which found the issues in favor of Hanks. The Board found in that case that all supervisory work formerly performed by the Night Chief had been transferred to the Chief Dispatcher. Hanks contended that the duties of Night Chief still exist at the Plattsburg office and that he actually performs such duties on his tour as Trick Train Dispatcher. There was no question of supervision or of the official capacity of plaintiff Hanks. The court held that the Adjustment Board having found favorably to Hanks, it would not disturb the order.

In the Crowley case, supra, the court held there was no obligation on the part of the defendant to create or reestablish any particular position, but the court states the difference in the two cases in its conclusion, to-wit:

"Necessity for the position of Night Chief Dispatcher is not an issue here, as it was in the Hanks case, although the Board seems to have reached its conclusion

upon that assumption, ignoring the essential difference between the two cases.

"The defendant is entitled to a judgment dismissing the complaint." (P. 167.)

In the present case, in the interest of economy the Yardmaster's position was abolished and there was no subsequent need for it, and surely the railroad could not be required to re-establish it for the sole purpose of giving Mr. Beeler a job. The court stated in the Hanks case, *supra*:

> "Neither management nor labor, both charged with obligation of the successful operation of a business, can afford to maintain a useless position therein." (P. 163.)

The Findings of Fact are Fully Supported by the Evidence. The Law is Correctly Stated by the Court and Should be Sustained.

Rule 52 (a) as amended states:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses."

Appellees submit there has been no showing that the Findings of Fact are erroneous in any respect.

With respect to Findings of Fact, it was held in *Alabama Power Co. v. Ickes*, 302 U. S. 464, 58 S. Ct. 300, page 303, that:

> "These findings were made, after hearing, by the district judge upon undisputed or conflicting evidence. The findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as unassailable. *Davis v. Schwartz*, 155 U. S. 631, 636, 637, 15 S. Ct. 237, 39 L. Ed. 289, *Adamson v. Gilliland*, 242 U. S. 350, 353, 37 S. Ct. 169, 61 L. Ed. 356."

Since the correctness of the findings has not been attacked, it must be assumed at least that they are correct and should not be set aside.

U. S. v. Aluminum Company of America, 148 Fed. 2d 416, the court said at p. 433:

> "Since an appellate court must have some affirmative reason to reverse anything done below, to reverse a finding it must appear from what the record does preserve that the witnesses could not have been speaking the truth, no matter how transparently reliable and honest they could have appeared. Even upon an issue on which there is conflicting direct testimony, appellate courts ought to be chary before going so far; and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed 'unassailable,' except in the most exceptional cases."

And again at p. 434, the court said:

> "Upon this, as upon all the issues, the plaintiff had the burden and must lose unless it succeeded in doing more than leaving the proof in balance. Taking all these considerations together, it seems plain to us that we should be unwarranted in declaring these findings 'clearly erroneous'."

In this case and in his first cause of action thereof, Mr. Beeler predicated his right to recover in that certain named officials prevented this plaintiff from exercising his seniority rights and his reinstatement in his duly assigned job as Yardmaster at Wichita, and that their wrongful acts were the sole and proximate cause of the damages and loss of salary of plaintiff to date and until such time as he is reinstated and duly assigned his job as Yardmaster at Wichita, Kansas. In his second cause of action in the same case, Mr. Beeler demands judgment against the defendants and each of them for damages and loss of salary for the period of his life ex-

pectancy from June 14, 1946, 11.10 years. Plaintiff Beeler proceeds upon the theory that there was a Yardmaster job available to him in the Wichita yard. As has been shown above herein, that position or job was definitely abolished in January, 1939, and its abolition was in strict accord with the powers reserved by the employer and concurred in by the Yardmasters' Organization in the various contracts to which reference has been made, of July 30, 1935, January 1, 1938, and May 20, 1944. All of these recognize the unrestricted right of the employer to abolish Yardmaster positions. The agreements further preserve to Yardmasters their seniorities wherever such seniority may have accrued. In Mr. Beeler's case his seniority entitled him to a place as Switchman at Caldwell. Thus he was not thrown out of employemnt but had the right to avail himself of that place with its accompanying remuneration."

Respondents rely heavily on *Elgin, J. & E. Ry. Co. v. Burley,* in which there were two decisions of this court under the same title, namely, 325 U. S. 408, 65 S. Ct. 1282; and 327 U. S. 661, 66 S. Ct. 721. The facts involved are stated by Mr. Justice Rutledge in the first case at page 712. He stated:

> "The cause brings for decision novel and important questions concerning the authority of a collective bargaining representative, affecting the operation of the Railway Labor Act of 1934. * * * The ultimate issues are whether such an agent has authority, by virtue of the Act or otherwise, either to compromise and settle accrued monetary claims of ten employees or to submit them for determination by the National Railroad Adjustment Board, to the exclusion of their rights, after the settlement and after the Board's adverse decision, to assert them in a suit brought for that purpose."

The claims are for "penalty damage" for alleged violation of the starting time provisions of a collective agreement.

In the second opinion at page 663, referring to the previous decision, the Court said:

> "That opinion expressly refrained from undertaking to make a definitive statement of what might be sufficient evidence of the collective agent's authority either to settle finally the aggrieved individual employee's claims or to represent him exclusively before the Adjustment Board. We do not attempt to do so now. For whether the collective agent has such authority is a question which may arise in many types of situations involving the grievances either of members of the union or of non-members or both, and necessarily, therefore, no all-inclusive rule can be formulated for all such situations."

The facts in the present case differ in their entirety from those outlined in the cases of *E. J. & E. Ry. Co. v. Burley.*

In the present case we find a Yardmaster job abolished and such duties as may have attached thereto, wholly supervisory in their nature, were transferred and added to those of the Agent, who occupied an official position not subject to any labor agreement. Mr. Fowler served in that position 8½ years without complaint to anyone and without controversy of any nature whatsoever. His situation comes well within the principles of law as declared in the decisions referred to herein, though the facts may be different from those here involved. The decision of the Circuit Court of Appeals reviewed the various agreements to which reference has been made, and having reviewed the record and the assignment of errors, reached the conclusion that the Station Agency at Wichita, a large and important city, was not covered by or included within any labor agreement. No notice to the Yardmaster by the employer was necessary in the decision of the master to establish or abolish such position at any point on the railway system. This is in accord with the practice and fully justified by *Ex Parte* No. 72 (c).

For convenience and clarity respondents separated the foregoing cases insofar as seemed consistent with the requirements thereof, but respectfully request that the law as presented be applied to each as it may be in point or controlling.

Respondents believe the decision of the lower court conforms with the decision of other circuit courts and of this court, as indicated by the decisions to which reference has been made. The proceedings in the trial court and on appeal in the Circuit Court accord with the accepted and usual course of judicial proceedings. Respondents submit that these cases do not call for an exercise of this court's power of supervision.

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR WRIT OF CERTIORARI IN EACH FOREGOING CASE SHOULD BE DENIED.

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